

L9LsKLE1

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 DANIEL KLEEGERG, et al.,

4 Plaintiffs,

5 v.

16 Civ. 9517 (LAK)

6 WENDY EBER, et al.,

7 Defendants.

8 -----x  
New York, N.Y.

September 21, 2021

9:45 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES

14 BROOK & ASSOCIATES, PLLC  
15 Attorneys for Plaintiffs  
16 BY: BRIAN C. BROOK

17 FARRELL FRITZ, P.C.  
18 Attorneys for Defendants  
19 BY: KEVIN P. MULRY  
20 FRANK T. SANTORO  
-and-

21 HERBERT LAW  
22 Attorneys for Defendants  
23 BY: JOHN HERBERT

24 ALSO PRESENT:  
25 ALI L. KRAL, Paralegal  
SAMANTHA SKORIAK, Paralegal

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1 (Trial resumed)

2 THE COURT: Good morning, everyone. We are ready to  
3 start the defense case.

4 Mr. Mulry.

5 MR. MULRY: Your Honor, Frank Santoro.

6 We call Wendy Eber, the first witness for the defense.

7 WENDY EBER,

8 called as a witness by the Defendants,

9 having been duly sworn, testified as follows:

10 THE DEPUTY CLERK: Please state your name and spell  
11 your last name for the record.

12 THE WITNESS: Wendy Eber, E-b-e-r.

13 THE DEPUTY CLERK: Thank you.

14 THE COURT: You may proceed.

15 MR. SANTORO: Thank you, your Honor.

16 DIRECT EXAMINATION

17 BY MR. SANTORO:

18 Q. Good morning, Wendy.

19 Wendy, prior to the trial, did you work with me to  
20 prepare a declaration containing your direct testimony in this  
21 case?

22 A. I did.

23 Q. You reviewed that statement carefully?

24 A. I did.

25 Q. You signed that statement?

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1 A. I did.

2 Q. When you signed that statement, you were swearing to the  
3 truth of the contents of that statement, correct?

4 A. Yes.

5 Q. And do you reaffirm that statement today?

6 A. I do.

7 Q. I'm going to show you what's been marked for identification  
8 as Defendants' Exhibit ZA.

9 If you can scroll to the end, please, Samantha.

10 Wendy, you've seen Defendants' Exhibit ZA. Is that  
11 the statement we were just referring to?

12 A. Yes.

13 Q. Is that your signature on the page in front of you?

14 A. Yes.

15 MR. QUIJANO: OK. I would like to offer  
16 Defendants' ZA into evidence, your Honor.

17 MR. BROOK: Plaintiffs have a number of objections,  
18 which I e-mailed to the court last night. They are quite  
19 voluminous. If the court wants me to recite them verbally,  
20 I can do so.

21 THE COURT: No, but I don't like you e-mailing.

22 MR. BROOK: I apologize.

23 THE COURT: So file them.

24 MR. BROOK: I will file it on ECF, your Honor.

25 THE COURT: Received subject to the objections.

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1 (Defendant's Exhibit ZA received in evidence)

2 Anything else, Mr. Santoro?

3 MR. SANTORO: Yes, your Honor.

4 Since most of our exhibits are offered through  
5 Ms. Wendy Eber's declaration, we would offer all of defendants  
6 proposed trial exhibits into evidence at this time.

7 THE COURT: You're going to have to give me a list of  
8 what you're offering through this witness.

9 MR. SANTORO: Sure, your Honor.

10 We're offering all of the exhibits contained on our  
11 defendants' proposed trial exhibit list, which consists of  
12 Exhibits A through XXXXX.

13 THE COURT: A through?

14 MR. SANTORO: Quadruple X. X as in X-ray.

15 THE COURT: X as in X-ray.

16 MR. SANTORO: The Y exhibit, Exhibit Y is actually a  
17 multi-part exhibit, Exhibit Y1 through Y33, Y Hayes 1 to  
18 Y Hayes 2, and Y Stein 1 to Y Stein 7.

19 THE COURT: All right. I'm sure there are objections,  
20 right?

21 MR. BROOK: Yes, your Honor. As with the other  
22 exhibit list, they were e-mailed to court, and I will file  
23 those online, if I'm understanding your Honor's instructions  
24 correctly.

25 THE COURT: Yes.

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1 The exhibits are received subject to the objections.

2 (Defendant's Exhibits A through XXXX, Y1 through Y33,  
3 Y Hayes 1 through Y Hayes 2, Y Stein 1 and Y Stein 2 received  
4 in evidence)

5 MR. SANTORO: Your Honor, thank you. I would like to  
6 ask a few questions on some issues that came up on plaintiffs'  
7 case on leave of the court.

8 THE COURT: OK.

9 BY MR. SANTORO:

10 Q. First, Wendy, I would like to talk about the consulting  
11 agreement, Lester Eber's consulting agreement.

12 What kind of work did your father do for Southern Wine  
13 & Spirits under the consulting agreement?

14 MR. BROOK: Objection, personal knowledge.

15 THE COURT: Sustained.

16 A. He --

17 MR. SANTORO: The objection is sustained.

18 THE COURT: Not appropriate. When I say "sustained,"  
19 you stop, please.

20 Q. Wendy, when did your father begin working for Southern Wine  
21 & Spirits?

22 MR. BROOK: Same objection.

23 THE COURT: Same ruling.

24 MR. SANTORO: Your Honor --

25 Q. Wendy, are you aware of the work your father did for

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1 Southern Wine & Spirits?

2 A. Yes, I am.

3 Q. How are you aware of it?

4 A. Because he was -- you know, I saw him and I talked to him  
5 and I was around him. And I knew that he was going to Albany.

6 I knew he had an office at Southern. So I had spoken to him --

7 MR. BROOK: Objection, hearsay.

8 THE COURT: Certainly seems that way to me.

9 BY MR. SANTORO:

10 Q. Wendy, being around your father, can you tell me when he  
11 first started working for Southern Wine & Spirits?

12 A. Sure. It was after --

13 MR. BROOK: Objection.

14 THE COURT: Sustained.

15 Q. Did your father maintain an office after August of 2007?

16 A. At Southern? Yes.

17 Q. OK. Where was that office located?

18 THE COURT: Excuse me. Were you present in it?

19 THE WITNESS: No.

20 THE COURT: OK. Whatever you know about any office he  
21 had at Southern you know because he told you, is that right?

22 THE WITNESS: Well, he went there, yes.

23 THE COURT: And the reason you know that he went there  
24 is he told you he went there, right?

25 THE WITNESS: Yes.

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1 THE COURT: OK. Answer stricken. Objection  
2 sustained.

3 BY MR. SANTORO:

4 Q. Were you ever at that office, Wendy?

5 A. Yes.

6 Q. When did you visit that office?

7 A. When I interviewed for a job there.

8 Q. Where was it located?

9 A. I wasn't in his, per se, office. I was in their office.

10 Q. Where was -- and you're referring to Southern's office,  
11 correct?

12 MR. BROOK: Objection, vague. I'm not sure who "their  
13 office" is.

14 A. Southern's office.

15 MR. SANTORO: You have to wait for a ruling from the  
16 judge.

17 THE COURT: Go on.

18 MR. SANTORO: I'm sorry, Judge.

19 THE COURT: Go on.

20 MR. SANTORO: OK.

21 BY MR. SANTORO:

22 Q. So when did you -- when were you in that office?

23 A. I would say, like, 2007, late 2007, maybe September or  
24 something like that. October something.

25 Q. What year?

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1 A. 2007.

2 Q. OK. At the time you visited that office, was your father  
3 there?

4 A. No, he was -- he was not there.

5 Q. OK. Now, were you aware of your father's consulting  
6 agreement with Southern?

7 A. Yes, I was.

8 Q. How did you become aware of it?

9 A. I remember seeing it for the first time and printing it  
10 out, so I was aware of it.

11 Q. OK. Did your father -- how long did your father work for  
12 Southern?

13 MR. BROOK: Objection.

14 THE COURT: Sustained as to form.

15 Q. Well, other than your father telling you, was there any  
16 other observations that you had that led you to believe that  
17 your father worked for Southern?

18 A. Other people knew besides that. Besides my father, I had  
19 conversations with other people. Our CFO, you know, Lisa  
20 Semenik, Mike Gumaer, other people who were in the industry as  
21 well.

22 MR. BROOK: Objection to testimony based on hearsay.

23 THE COURT: Sustained. Stricken.

24 Q. So following August of 2007, did you spend time with your  
25 father?



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1 A. Yes.

2 Q. How often did you spend time with your father?

3 A. All the time. Weekly. I worked with him.

4 Q. OK. In what capacity did you work with him?

5 A. In winding down the New York business and also in  
6 Connecticut, our Connecticut ...

7 Q. And what did he do with his time?

8 A. He split it. He was in -- he would travel to New York. He  
9 lived in Rochester, New York. He would travel to New York, and  
10 he would spend certain days in New York City and Long Island  
11 working with Southern, and then he would come up to  
12 Connecticut, and then he was in Albany.

13 MR. BROOK: Move to strike the part about Southern.

14 THE COURT: Yes, that is all stricken. No personal  
15 knowledge.

16 Q. OK. Now, Wendy, there was some issue of Eber Wine &  
17 Liquor's transaction with Southern in 2007 came up on  
18 plaintiffs' case.

19 Can you tell me the proceeds of that transaction with  
20 Southern?

21 A. Approximately 22 million.

22 Q. What happened to that money?

23 A. It all went to pay down the bank, Wells Fargo, and vendor  
24 suppliers.

25 Q. OK. Harris Beach was performing work in connection with

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1 that transaction, right?

2 A. Yes.

3 Q. And, in fact, prior to -- well, what kind of work did  
4 Harris Beach provide for the Eber entities?

5 A. They were lawyers.

6 Q. Who did they perform work for?

7 A. All the companies.

8 Q. To your knowledge, who was responsible for paying them?

9 A. All the companies.

10 Q. OK. Now, finally, briefly, I think your declaration states  
11 in paragraph 83 that Lester Eber received 750 shares of class B  
12 junior preferred stock of Eber Wine & Liquor in February 2017.

13 Can you tell me your understanding of why he received  
14 that?

15 A. Yes. We were in the process of settling with the PBGC.  
16 And from ERISA law, their rules, in order for him to waive his  
17 benefit --

18 MR. BROOK: Objection to legal opinion.

19 THE COURT: I'm sorry?

20 MR. BROOK: Objection to legal opinion on ERISA. Most  
21 lawyers don't understand that.

22 THE COURT: Objection sustained.

23 MR. SANTORO: I asked her for her understanding at the  
24 time.

25 THE COURT: Yes, I know. What is her understanding in

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1 terms of relevance to the case?

2 MR. SANTORO: It goes to her state of mind in her part  
3 in effectuating the transaction.

4 THE COURT: Is that an issue?

5 MR. SANTORO: I believe so, your Honor. I believe the  
6 plaintiffs are attacking every action that Wendy Eber took  
7 here.

8 THE COURT: Every action?

9 MR. SANTORO: That she took as an officer and director  
10 of Eber Wine & Liquor.

11 THE COURT: So far I haven't heard of any actions she  
12 took. So far what I'm hearing is that she had some awareness  
13 of this transaction, and you're trying to elicit from her the  
14 reason of some unknown person or persons as to why it was done.

15 MR. BROOK: Your Honor, it's true that plaintiffs  
16 generally allege that this bad state of mind and not acting in  
17 good faith throughout this case due to certain indemnification  
18 provisions as it relates. As to this action, plaintiffs do not  
19 challenge it based on anyone's state of mind. It has to do  
20 with various corporate rules and trustee rules not being  
21 followed.

22 THE COURT: I think that takes care of it.

23 Unless you can establish personal knowledge, there is  
24 no more basic rule than that.

25 MR. SANTORO: I understand that, your Honor.

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Cross - w. Eber

1 BY MR. SANTORO:

2 Q. Wendy, did you have a part in the issuance of the  
3 750 shares of class B junior preferred stock?

4 A. I believe so, yes.

5 Q. OK. So were you aware of it when it was happening?

6 A. Yes.

7 Q. And can you tell me your understanding of why it was done?

8 A. Yes. My father was waiving his right to his pension plan  
9 benefit, the joint -- and survivor benefit. And in order to do  
10 that, he had to be the beneficial owner of a majority of the  
11 Eber Wine & Liquor corporation stock.

12 Q. OK.

13 (Counsel confer)

14 MR. SANTORO: Thank you, Wendy.

15 Thank you, your Honor.

16 THE COURT: All right. Thank you.

17 Cross-examination.

18 MR. BROOK: Just a little, your Honor. Just to be  
19 clear also with my expectations, I was being sarcastic. I  
20 apologize.

21 CROSS-EXAMINATION

22 BY MR. BROOK:

23 Q. Good morning, Ms. Eber.

24 A. Good morning.

25 Q. You remember me, I'm Brian the lawyer for the plaintiffs in

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Cross - w. Eber

1 this case, correct?

2 A. Yes.

3 Q. I deposed you on four separate days before today, correct?

4 A. Yes.

5 Q. Would you mind just speaking up a little bit when you  
6 answer? It is actually very hard to hear you. Speak into the  
7 microphone.

8 A. Yes.

9 Q. Thank you.

10 I just want to touch on some of the things you just  
11 said to try to clarify it.

12 You said that you worked with Lester all the time  
13 since 2007, correct?

14 A. I worked -- I worked with him, yes.

15 Q. You specifically used the words "all the time," did you  
16 not?

17 A. Yes.

18 Q. But you never once saw him in any Southern Wine & Spirits  
19 office during that time, correct?

20 A. No.

21 THE COURT: No, it's not correct, or no, you never saw  
22 him there?

23 THE WITNESS: I never saw him in the Southern office.

24 THE COURT: Thank you.

25 Q. You said that all the companies were responsible for paying

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Cross - w. Eber

1 Harris Beach, is that right?

2 A. That's my understanding.

3 Q. And isn't it true that up until 2007, you were not in the  
4 role of a chief financial officer with any Eber Brothers  
5 company in New York, correct?

6 A. Correct.

7 Q. Since 2007, isn't it true that every Harris Beach bill that  
8 was paid, was paid by Eber Brothers Wine & Liquor Corp.,  
9 correct?

10 A. I don't believe so.

11 Q. Can you think of any examples where that didn't happen,  
12 putting aside Lester himself buying Harris Beach's claims for  
13 \$400,000?

14 A. He paid that claim. He paid that claim.

15 Q. OK. So besides that payment, is there any other time when  
16 any entity besides Eber Brothers Wine & Liquor Corp. paid a  
17 Harris Beach bill that you personally know about?

18 A. I don't recall.

19 Q. You said just in your last bit of testimony that Lester had  
20 to be the beneficial owner of Eber Wine & Liquor's stock in  
21 order for him to waive his pension benefit, is that correct?

22 A. No.

23 MR. SANTORO: Objection, your Honor.

24 THE COURT: I don't think that's what she said.

25 MR. BROOK: I must have misheard it again.

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Cross - w. Eber

1 Q. Can you please restate it, what it was exactly that you  
2 said that he -- why it was he had to be a shareholder as part  
3 of that settlement?

4 A. He --

5 MR. SANTORO: Objection, mischaracterizing the  
6 testimony, your Honor.

7 THE COURT: Yes, I think that's true. Sustained as to  
8 form.

9 Q. OK. I'll have to go back to the transcript then. I must  
10 have misheard it.

11 All right. In your declaration, is it fair to say,  
12 Ms. Eber, that you provided an extensive amount of financial  
13 information about the Eber Brothers companies and their  
14 affiliates?

15 A. Yes.

16 Q. Were you careful to ensure that the information you  
17 included was accurate?

18 A. To the best of my ability, yes.

19 Q. Did you do it yourself?

20 A. Which specific?

21 Q. Well, there's a lot of financial information in your  
22 declaration, correct?

23 A. There are references to financial statements and, yes, we  
24 had a lot of financial statements in there. And we referenced  
25 losses in Connecticut specifically, and then parts of the

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Cross - w. Eber

1 settlements.

2 Q. So you're saying you can read a financial statement and  
3 pull information out of it correctly, is that right?

4 A. Yes.

5 Q. And that includes a profit and loss statement, or a P and  
6 L, correct?

7 A. Yes.

8 Q. You can also take a look at, for example, a general ledger  
9 for a company and determine whether information in there is  
10 accurate when putting that into your statement, correct?

11 MR. SANTORO: Objection, your Honor. I'm not sure  
12 what the question is.

13 THE COURT: Sustained.

14 Ms. Eber, I think I picked up somewhere in this  
15 material that you have a master's degree in business  
16 administration from the Simon School of Business at the  
17 University of Rochester, is that right?

18 THE WITNESS: Yes.

19 THE COURT: Did you concentrate in any particular  
20 area?

21 THE WITNESS: Finance and marketing.

22 THE COURT: Are you or are you not a CPA?

23 THE WITNESS: I am a non-practicing CPA, yes.

24 THE COURT: Non-practicing, but you have a license?

25 THE WITNESS: Yes, I do.



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Cross - w. Eber

1 THE COURT: All right. That's fine.

2 Let's go ahead.

3 What year did you get that MBA?

4 THE WITNESS: '95.

5 THE COURT: I was on the visiting committee of that  
6 school, but much earlier. So I have a reasonable regard for  
7 counsel, as you might expect.

8 BY MR. BROOK:

9 Q. As part of your declaration, you also provided a discounted  
10 cash flow analysis or DCF, correct?

11 A. Yes, I did.

12 Q. And you believe that you were capable of reliably inputting  
13 information into that calculation, correct?

14 A. I created it, yes.

15 Q. OK. Let's look at just the first couple of instances in  
16 your testimony where you provide some numbers for the court.  
17 Declaration page nine of the PDF paragraph 20.

18 You say here that Dan Kleeberg abandoned the business  
19 and moved to Florida in 2007 while continuing to collect  
20 \$10,000 a month consulting fee for more than a year and 7,500  
21 per month afterwards.

22 Is that information correct?

23 A. I believe so, yes.

24 Q. How did you verify that information?

25 A. He had a contract or he had an agreement -- I think there

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Cross - w. Eber

1 was a bill somewhere I saw. And I believe there were payments  
2 that were made to him and then it went down. I saw some  
3 document that said that it went down.

4 Q. All right. So you did verify this information before you  
5 put it in here, correct?

6 A. To the documents, yes.

7 Q. OK. Did you look at the general ledger for Eber Wine &  
8 Liquor when doing that?

9 A. I -- I did look at the general ledger because I know it was  
10 a document that was included in discovery. It's a very thick  
11 document, so I don't recall every single entry into it.

12 Q. Let's pull up Exhibit 160 at page 62.

13 If you can blow out the sales expense figures, please,  
14 Ali.

15 All right. If you're able to expand that. Great.

16 All right. Now we're looking at the sales expense  
17 category for Eber Wine & Liquor, and this is a general ledger  
18 that begins August 31, 2007, right after the Southern deal,  
19 correct?

20 A. Yes.

21 Q. It goes all the way through the end of May 2012, does that  
22 sound correct, in terms of what you provided to us?

23 A. I only see through ...

24 Q. I'll withdraw the question.

25 What we're looking at here is the sales expenses that

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Cross - w. Eber

1 were recorded on the general ledger that you provided and they  
2 end August 31, 2009, correct?

3 Bottom left corner.

4 A. Yes.

5 Q. All right. Do you see any payments in the amount of  
6 \$10,000 there?

7 A. No, I don't.

8 Q. Isn't it true, in fact, that the first payment in the  
9 highlighted section is for 15,000, which is two times \$7,500,  
10 correct?

11 A. Correct.

12 MR. SANTORO: Object as to foundation.

13 THE COURT: Overruled.

14 Q. All right. So you can see that there are \$7,500 payments  
15 until the last one seems to be November 30, 2008.

16 Do you see that?

17 2008, Ali.

18 A. Yes.

19 Q. Then it actually decreases into half, 3750, correct?

20 A. Yes, it does.

21 Q. According to this, Dan Kleeberg, in 2008, was paid \$7,500 a  
22 month for 11 months and 3750 for one month at the end, correct?

23 MR. SANTORO: Object, your Honor.

24 THE COURT: Sustained.

25 Q. Do you have any reason to believe that this is not the

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1 payment being made to Dan Kleeberg under the consulting  
2 agreement?

3 A. I don't know. I mean, I didn't book these or put this  
4 together. I was going from a document that I saw that --

5 Q. You were the chief financial officer of Eber Wine & Liquor  
6 in 2008, correct?

7 A. Yes.

8 Q. You would have reviewed any 1099s that were issued to the  
9 company for people working for Eber Brothers Wine & Liquor in  
10 2008?

11 A. I don't recall doing that.

12 Q. Let's see if we can try to refresh your recollection with  
13 Plaintiffs' Exhibit 310.

14 Just one moment.

15 All right. Now, showing you what is marked as  
16 Plaintiffs' Exhibit 310, this appears to be a 1099 issued in  
17 2008 for Eber Brothers Wine & Liquor Corp.

18 Do you see that?

19 A. Yes.

20 Q. Do you see that the total amount of non-employee  
21 compensation paid to Dan Kleeberg was \$86,250?

22 A. Yes.

23 Q. So does that refresh your recollection that, in fact, Dan  
24 Kleeberg was only paid \$7,500 a month for the first 11 months  
25 of 2008?

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1 MR. SANTORO: Object, your Honor.

2 THE COURT: Overruled.

3 Q. Does that refresh --

4 A. I'm sorry.

5 Q. Does that refresh your recollection that Dan Kleeberg was  
6 not paid \$10,000 a month?

7 A. This document says that he wasn't, so ...

8 Q. OK. You can take that down.

9 A. He -- yeah.

10 THE COURT: Just give me that figure again. 86,250,  
11 was it?

12 MR. BROOK: I believe that's right, your Honor.

13 THE COURT: That squares to the penny with --

14 MR. BROOK: Exhibit 160.

15 THE COURT: -- exhibit 160, page 62?

16 MR. BROOK: Yes, your Honor.

17 THE COURT: All right.

18 BY MR. BROOK:

19 Q. Now, let's look at the next bit of financial information  
20 you have in your paragraph 24 of your declaration.

21 All right. Here, I'm not looking to read the whole  
22 thing. Just looking at the second sentence, you provide  
23 information for the net income for Eber Wine & Liquor in 2005  
24 and 2006, correct?

25 A. Yes.

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1 Q. And you would have gotten this information from the P and L  
2 statement as part of Eber Wine & Liquor's financial statement,  
3 correct?

4 MR. SANTORO: Object, your Honor.

5 THE COURT: Objection to the form and sustained.

6 Q. All right. Where did you get this information from?

7 A. The financial statement ending 2005 and 2006.

8 Q. OK. So that exhibit is already in as Exhibit 205.

9 Ali, could you please put up Exhibit 205, maybe  
10 alongside this one, I believe it's -- I can't remember if it is  
11 page six or exactly where. Page seven of Exhibit 205. Then if  
12 we can go back to paragraph 24 and put that there on the left.

13 All right. So you see that, in fact, the net  
14 income -- the net income --

15 If you can actually zoom in, Ali, from other income  
16 expenses in the middle all the way down to the bottom. Great.  
17 Put that on the side so it is not blocking the other one.  
18 Great.

19 All right. When you said that there was approximately  
20 29 million in income in 2005, you were actually reading the net  
21 other income, correct, not the net income?

22 A. The net income on the bottom line here. Sorry.

23 Q. Oh, the net income here is for 2005 is clearly \$20,362,231,  
24 correct?

25 A. Yes.

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1 Q. All right. The number that you provided in your statement  
2 was approximately 29 million, correct?

3 A. Yeah. Can I see -- what does it say on top? Yeah. Yeah,  
4 it's before the -- before minority interest and other things,  
5 yes.

6 Q. So and then --

7 A. You can't really see what this says here.

8 MR. BROOK: Ali, close the callout on the right so she  
9 can see the whole document.

10 A. Other income and expenses, yes. Yes, the bottom line is 20  
11 and nine.

12 Q. I'm sorry. You're saying it is 20, not 29?

13 A. Well, you're saying the bottom -- you're saying the net  
14 income in 2005 was 20?

15 Q. Yes.

16 A. And then the loss was in 2006.

17 Q. Then the loss in 2006 was \$9,134,000 and change, not  
18 12.7 million, correct?

19 A. Correct.

20 Q. And it looks like, in this instance, you misread which part  
21 of the financial statement was the net income, is that correct?

22 A. Yes.

23 MR. BROOK: All right. You can take that down, Ali.

24 Just one second.

25 (Pause)

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1 THE COURT: Let's just pause for a moment so that I  
2 get what, I take it, you now both agree are the correct  
3 figures.

4 Put up the exhibit again.

5 MR. BROOK: Page seven.

6 THE COURT: It does not, does it, show the sales  
7 figure, right, refer to the first sentence of paragraph 24 of  
8 the witness statement, am I right?

9 MR. BROOK: Let's see. I don't have the witness  
10 statement right here.

11 THE COURT: Oh, I see. There we are.

12 So the 2005 sales figure in the statement is  
13 approximately correct. It is approximately correct for 2006  
14 also.

15 MR. BROOK: Yes.

16 THE COURT: The net income figure for 2005 is about  
17 20 million and the net loss the following year was about  
18 9.1 million, and that's what it amounts to; yes?

19 MR. BROOK: Yes, your Honor.

20 THE COURT: OK.

21 BY MR. BROOK:

22 Q. Just to be clear, so, Ms. Eber, by just looking at the  
23 other income information, that does not include any of the  
24 operating income or sales, correct?

25 A. I'm sorry?



L9LsKLE1

Cross - w. Eber

1 Q. Other income as a category, excludes operations, does it  
2 not?

3 A. Yes. You've got to go up, yeah. Right, so the other  
4 expenses.

5 Q. Right.

6 THE COURT: Ms. Eber --

7 THE WITNESS: Operations and then other income  
8 expenses.

9 THE COURT: Ms. Eber, what was the net loss from  
10 subsidiary in 2006?

11 THE WITNESS: I'm not sure where you're referring to.  
12 I don't see that.

13 MR. BROOK: It's been highlighted.

14 THE WITNESS: What was that? I don't know. I didn't  
15 put these financial statements together, your Honor. I was not  
16 involved in the production of this statement.

17 THE COURT: This precedes the time when you were chief  
18 financial officer?

19 THE WITNESS: Yes.

20 THE COURT: OK. Thank you.

21 BY MR. BROOK:

22 Q. Is it correct that you did not actually become a chief  
23 financial officer of Eber Brothers until after Lisa Semenik  
24 resigned in October 2007?

25 A. Correct.

L9LsKLE1

Cross - w. Eber

1 Q. And you were also not a board member of Eber Wine & Liquor,  
2 Eber-Metro, or Eber-Connecticut until Lisa Semenik resigned in  
3 October 2007, correct?

4 A. Correct.

5 Q. All right. Some of the things that happened --

6 Keep up Exhibit 205. We're going to go back to that  
7 shortly.

8 You testified about Lester Eber's alleged loans in  
9 2002 and 2005 in your declaration, correct?

10 Do you want us to go there to refresh your  
11 recollection of what you said about those loans?

12 A. I'm sorry?

13 Q. Did you not testify about loans that Lester, your father,  
14 purportedly made in 2002 and 2005?

15 A. Footnoted in footnote nine.

16 Q. Footnote nine of this financial statement?

17 A. Yes.

18 Q. OK. Let's go to page 18, I believe it is, of the exhibit  
19 or the PDF.

20 This is talking about the long-term debt. So it is  
21 your understanding that that first set of numbers of unsecured  
22 non-interest bearing note payable to an officer with no set  
23 repayment date refers to loans that your father made, is that  
24 right?

25 A. Yes.

L9LsKLE1

Cross - w. Eber

1 Q. And you've testified to that even though you were not  
2 involved in the chief financial officer function at the time,  
3 correct?

4 A. I was not chief financial officer at the time.

5 Q. And you did not have any bank records or canceled checks  
6 indicating that Lester Eber ever made any payments to the  
7 company around the time of these purported loans, correct?

8 A. I didn't have those, but the -- no, I don't have those.

9 Q. And you searched for them in response to the discovery  
10 requests in this case, correct?

11 A. Yes.

12 Q. And you could not find any such evidence of payments being  
13 made by Lester in that time period, correct?

14 A. There were some checks. We couldn't find them.

15 Q. You say there were some checks, but you couldn't find them?

16 A. Yes, there were checks. We couldn't find them.

17 THE COURT: How do you know that?

18 THE WITNESS: He -- he had bank records where he was  
19 trying to find a specific check and couldn't find them.

20 THE COURT: So when you say there were some checks,  
21 what I'm understanding you to be saying is that there were,  
22 generally speaking, all sorts of checks and that you or someone  
23 under your supervision went through them and you couldn't find  
24 any checks that reflected payments by your father into the  
25 company, is that accurate?

L9LsKLE1

Cross - w. Eber

1 THE WITNESS: At this time period, yes.

2 THE COURT: At this time period?

3 THE WITNESS: These. These, I don't have.

4 THE COURT: OK. Thank you.

5 THE WITNESS: There is --

6 THE COURT: Go ahead. I don't mean to cut you off.

7 THE WITNESS: He did with the CFO. There is a note  
8 payable that was signed.

9 THE COURT: Well, who signed the note payable?

10 THE WITNESS: The CFO.

11 MR. BROOK: Why don't we put them up on the screen so  
12 we're all on the same page, your Honor.

13 THE COURT: OK.

14 MR. BROOK: Let's start with Defense Exhibit K.

15 A. These were audited by the auditors.

16 Q. So you're saying that these were -- you know that this  
17 Exhibit K and the other note for \$575,000, Exhibit L, were  
18 received by the auditors, is that right?

19 A. What I'm saying is that the auditors put together the  
20 financial statement and they audit the financial statement.

21 Q. OK. Isn't it true that there can be many different reasons  
22 why someone is given a promissory note besides that person, the  
23 recipient, having loaned money to the maker, correct?

24 MR. SANTORO: Objection, your Honor.

25 THE COURT: Overruled.

L9LsKLE1

Cross - w. Eber

1 A. I don't know.

2 Q. Let me look at this.

3 THE COURT: Can I get a moment of clarification here?

4 The financial statements, if I remember correctly, are  
5 exhibit?

6 MR. BROOK: 205.

7 THE COURT: 205.

8 MR. BROOK: Page 18 of the PDF refers to certain  
9 notes.

10 THE COURT: Would you turn to the auditor's report  
11 there on the financial statement?

12 MR. BROOK: You're talking about the opinion, the  
13 signed opinion? I'm sorry.

14 THE COURT: The opinion.

15 MR. BROOK: Page three, I believe.

16 THE COURT: Ms. Eber, is there any way of telling from  
17 Plaintiffs' Exhibit 205 whether the auditors ever saw checks  
18 from your father for the loans we've just been discussing to  
19 the company?

20 THE WITNESS: I don't have knowledge of that.

21 THE COURT: Is it correct that we have no way of  
22 knowing that they verified the existence of the payable to your  
23 late father, that's referred to in footnote nine, beyond  
24 looking at the notes, is that true?

25 THE WITNESS: I don't know what their procedure is. I

L9LsKLE1

Cross - w. Eber

1 was not involved in the production of --

2 THE COURT: That's simply what I'm trying to  
3 establish.

4 THE WITNESS: Yeah.

5 THE COURT: Just so that I understand what the  
6 evidence shows and doesn't show. OK.

7 (Continued on next page)

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L9L2K1e2

W. Eber - Cross

1 BY MR. BROOK:

2 Q. I think there may be a way to see whether the auditors even  
3 saw these notes. Ali, would you please pull up Exhibit K  
4 again. Zoom in on the second paragraph.

5 All right. Looking at the last line, do you see,  
6 Ms. Eber, it says that there is interest at a rate of 6  
7 percent, crossed out, by Lester Eber only, and raised to 9  
8 percent from the date of the original note until paid?

9 Correct?

10 A. Correct.

11 Q. And the original note -- just to pull it back out, Ali, the  
12 first paragraph says that was August 15, 2005, correct?

13 A. Sorry. Are you --

14 Q. That says that the original note was August 15, 2005,  
15 right?

16 A. Yes.

17 Q. And the date of this amended and restated note is March 13,  
18 2006, correct?

19 A. Yes.

20 Q. So that is before the fiscal year end of May 31, 2006  
21 reflected in the financial statement we were just looking at,  
22 correct?

23 A. Yes.

24 MR. BROOK: And so let's go back, Ali, and let's take  
25 a look at Exhibit 205.

L9L2Kle2

W. Eber - Cross

1 THE COURT: Before you back up, could I please see who  
2 signed the note.

3 MR. BROOK: Oh, yes, your Honor.

4 THE COURT: Okay. Thank you.

5 BY MR. BROOK:

6 Q. We can see that this is dated as of the 13th day of March,  
7 correct?

8 THE COURT: I read that as "12th."

9 MR. BROOK: Oh.

10 THE COURT: It could be either.

11 MR. BROOK: Either way. Doesn't make a difference.

12 Let's now go back to Exhibit 205 at page 18 of the  
13 PDF. Let's look at that related party debt description again.  
14 Q. Do you see that the auditors described the note as being as  
15 noninterest-bearing note payable --

16 A. It's a mistake.

17 Q. How do you know that?

18 A. Because it was interest bearing, and the only officer that  
19 was lending money, they had, you know --

20 Q. You had no personal knowledge that this was a mistake  
21 rather than simply an instance where a note was backdated to a  
22 date before the date of an audit, do you?

23 MR. SANTORO: Objection, your Honor.

24 THE COURT: Overruled.

25 A. Sorry. Can you repeat the question?



L9L2Kle2

W. Eber - Cross

1 Q. Yes. You have no personal knowledge that this was a  
2 mistake by the auditors rather than an instance where a note to  
3 your father was backdated to a date before the date of the  
4 audit.

5 MR. SANTORO: Just objection.

6 THE COURT: Overruled.

7 A. I am saying that it is an interest-bearing note. What I am  
8 saying is the description here is incorrect. But I don't have  
9 any knowledge about back -- I don't understand your question  
10 about backdating.

11 Q. I am just asking --

12 A. I am just saying it is an interest-bearing note. This  
13 description is incorrect. So --

14 THE COURT: Well, we know that Exhibit K and Exhibit  
15 L, by their terms, are interest-bearing. The point of  
16 counsel's question is, it is possible that those two pieces of  
17 paper didn't exist within the audit period, is it not?

18 THE WITNESS: No.

19 THE COURT: Well, did you see them within the audit  
20 period yourself with your own eyes?

21 THE WITNESS: No.

22 THE COURT: Okay.

23 MR. BROOK: Let's look at one more thing. Ali, could  
24 you possibly leave that up and then put by the side of it the  
25 Defense Exhibit L. Sorry, let's do on the left. I wanted to

L9L2Kle2

W. Eber - Cross

1 have Exhibit 205, page 18 . . .

2 BY MR. BROOK:

3 Q. Now, Exhibit L is another promissory note dated March 13,  
4 2006, the same day as Exhibit K, correct?

5 A. Yes.

6 MR. BROOK: And just, Ali, if you can, zoom out for a  
7 second and just scroll the second page on the right document.

8 Q. See this is also signed by Lester Eber and John Ryan,  
9 correct?

10 A. Yes.

11 Q. Zoom back out. Let's go back to the first page. And let's  
12 zoom in on the first paragraph and the number in the upper  
13 left.

14 All right. So this is saying, this is amended and  
15 restated promissory note replacing a note dated October 1,  
16 2002, correct?

17 A. Yes.

18 Q. And it is saying that the amount due as of March 13, 2006  
19 is \$575,895 on that 2002 note, correct?

20 A. Yes.

21 Q. Now let's again move that blow up and let's blow up the  
22 related party debt line on the left. Get the date on that the  
23 year above that, too. No, no, no, just the years 2005 and '6.  
24 There we go.

25 All right. So the auditors, according to their

L9L2K1e2

W. Eber - Cross

1 report, as of May 31, 2005, the amount of debt owed to your  
2 father was \$263,571, correct?

3 A. Yes.

4 Q. And so that is your understanding that reflects the balance  
5 as of that date on the 2002 note referenced in Exhibit L,  
6 correct?

7 A. I wasn't there, but that's what the document says.

8 Q. And you have no idea why your father and Lester Eber would  
9 be restating a promissory note that had already been paid off  
10 by nearly half at a higher number, do you?

11 MR. SANTORO: Objection, your Honor.

12 MR. BROOK: I will withdraw the question.

13 You can take that down, Ali.

14 BY MR. BROOK:

15 Q. Now in 2005, you were living and working primarily in New  
16 York City, correct?

17 A. Yes.

18 Q. So you were working for the Eber-Metro entity primarily, is  
19 that right?

20 A. Yes.

21 Q. And is it correct also that at some point your father  
22 wanted you to get experience in Albany, so you started working  
23 with Dan Kleeberg on that?

24 A. Well, as we -- we lost a lot of employees and then I moved  
25 into a sales position, sales management position at some point,

L9L2Kle2

W. Eber - Cross

1 you know, like 2005, '6, like that.

2 Q. So you were -- because you were working in the New York  
3 metro area, you were aware of the merger or acquisition of part  
4 of Eber-Metro by MDC, the Georgia-based distributor, correct?

5 A. Yes.

6 Q. And that was a deal that Lester Eber helped bring about  
7 himself, correct?

8 A. Yes.

9 Q. And are you aware that the board of directors actually  
10 passed a resolution thanking Lester for having brought that  
11 deal about?

12 A. I don't recall.

13 MR. BROOK: Okay. Let's put up Exhibit 25. This is  
14 not yet in evidence but I believe there is no objection.  
15 Plaintiffs go ahead and offer Exhibit 25.

16 MR. SANTORO: No objection.

17 THE COURT: Received.

18 (Plaintiff's Exhibit 25 received in evidence)

19 MR. BROOK: Let's flip to the second page, the bottom  
20 paragraph there.

21 BY MR. BROOK:

22 Q. And you see that that says that, "The board is authorizing  
23 the corporation to pay Lester Eber a commission in the amount  
24 equal to \$1,500,000 as consideration for all of his efforts  
25 relating to the consummation of the transaction, including, but

L9L2Kle2

W. Eber - Cross

1 not limited to, identifying NDC as a partner and negotiating  
2 all of the terms and conditions of the transaction."

3 Do you see that?

4 A. Yes.

5 Q. And it was in your testimony, I believe, that you said that  
6 Lester never got paid that amount, is that right?

7 A. I didn't testify to that.

8 Q. Okay.

9 A. I don't . . .

10 Q. To your knowledge, was Lester ever paid that \$1,500,000 as  
11 a commission?

12 A. I don't know, I . . .

13 MR. BROOK: Ali, why don't we go to the first  
14 comparison that I had you pull up.

15 THE COURT: What's the date of this document, counsel?

16 MR. BROOK: Oh, that's exactly where I am going to, so  
17 it is dated, according to the page, of May 31, 2005.

18 THE COURT: Okay.

19 MR. BROOK: However, there is one signature missing  
20 there.

21 Q. Do you see that, Wendy?

22 A. Yes.

23 Q. Okay. Let's go to the next page and take a look at when  
24 Mr. Gumaer signed it. Can you go to the top there, fax line.  
25 All right. So that says September 19, 2005.

L9L2Kle2

W. Eber - Cross

1           Now let's compare that against the date of the  
2           original supposed promissory note that was issued to Lester.  
3           Actually I think we are just looking at the numbers right now.  
4           Let's go to the next comparison, Ali.

5           So as part of your work trying to determine the amount  
6           that Lester had loaned, did you look into whether the  
7           promissory note was just a way of paying Lester that wouldn't  
8           get as much scrutiny from Wells Fargo, the lender?

9           MR. SANTORO: Objection, your Honor.

10          THE COURT: Overruled. Answer if you know.

11          A. What was the question? Sorry.

12          Q. If in the course of trying -- let's step back.

13                 You have done a lot of work over the years trying to  
14                 compile different loans that Lester made and other payments  
15                 that he made in order to try to make sure that he got credit  
16                 for that, correct?

17          A. Yes.

18          Q. And in the course of that work, did you ever investigate  
19                 whether the promissory note that was apparently originally  
20                 dated August 15, 2005, was in fact in lieu of a payment of a  
21                 commission to Lester for the NDC deal?

22          A. And what was the question if I --

23          Q. Did you ever look into that possibility?

24          A. I don't recall, you know, looking into that. I mean, I  
25                 believe I spoke with Sumner Pearsall, our tax accountant, about

L9L2Kle2

W. Eber - Cross

1 these loans, but I don't have specific knowledge.

2 MR. BROOK: Move to strike the portion about speaking  
3 with Sumner Pearsall to the extent it implies support for her  
4 testimony.

5 I will withdraw. Sorry. Overkill.

6 You can take that down, Ali.

7 BY MR. BROOK:

8 Q. Let's talk a little bit more about Exhibit L. That's the  
9 \$575,000 note. When did you find this document?

10 A. I don't recall.

11 Q. Isn't it correct that you -- well, let's step back.

12 So you recall that there was a meeting of the trustees  
13 of the Allen Eber Trust on August 18, 2011, to discuss Lester's  
14 loans, correct?

15 A. I believe so, yes.

16 Q. And you were present for that meeting, correct?

17 A. Yes.

18 Q. And you in fact prepared --

19 A. Either there or by phone.

20 Q. You prepared the minutes of that meeting, correct?

21 A. Yes.

22 Q. And isn't it true that during that meeting to discuss  
23 Lester's loans in fact only two loans were ever discussed and  
24 supposedly ratified.

25 A. I'm not looking at the meeting minutes, but there were two

L9L2Kle2

W. Eber - Cross

1 that were outstanding. There were the old loans and the new  
2 loans.

3 Q. Let's take a look at Exhibit 234 in evidence. Let's go to  
4 the top. Actually ignore that.

5 Just so we are clear, this is -- the top e-mail here  
6 is you forwarding an e-mail from 2011 to someone named Maria  
7 Soeffing, if I am saying that right. Who is she?

8 A. Doesn't she work for a law firm?

9 Q. So it's your understanding she was Underberg & Kessler's  
10 paralegal, is that right?

11 THE COURT: I couldn't understand you, counsel.

12 Q. She was Underberg & Kessler's, your former law firm's,  
13 paralegal, is that right?

14 A. I believe so.

15 Q. So let's go to the second page. Let's first go to the  
16 third page, Ali. It was -- let's zoom in on the bottom two  
17 parts.

18 So is it correct that on about September 16, 2011, you  
19 e-mailed minutes to a trustee meeting dated August 18, 2011, to  
20 Glenn Sturm at two different e-mail addresses and copying your  
21 father?

22 A. Yes.

23 Q. And in response to that, your father said, about two hours  
24 later, "okay." Do you see that?

25 A. Yes.



L9L2Kle2

W. Eber - Cross

1 Q. Let's take a look at those minutes on page 2 of the  
2 exhibit, Ali. Can you blow up the second and third paragraphs.  
3 Actually include the first. Let's do that.

4 All right. The first paragraph refers to who was  
5 present for this meeting or participated by phone, correct?

6 A. Yes.

7 Q. Is that yes?

8 A. Yes.

9 Q. All right. You don't mention yourself here, is that right?

10 Oh. I'm sorry. You do. You say, "Wendy Eber was present to  
11 facilitate and document the discussion," last line of that  
12 paragraph. Do you see that?

13 A. Yes.

14 Q. But you don't mention Glenn Sturm, do you?

15 A. No.

16 Q. So the person you were sending these minutes to on  
17 September 16 was not present for that meeting, is that a fair  
18 assumption?

19 A. I'm not sure. He may have been. I --

20 Q. Well --

21 A. It's not in this memo, but he may have been participating  
22 by phone.

23 Q. Let's look at now the substance of the meeting. The very  
24 next line says the trustees ratified two loans made by Lester  
25 Eber to Eber Brothers Metro, Inc., and it says that the first

L9L2Kle2

W. Eber - Cross

1 loan was from October 2009, that was assumed by Metro in 2010,  
2 and that's -- just to cut to the chase, that's the line of  
3 credit note for \$1.5 million, correct?

4 A. Yes.

5 Q. And then it says the second loan, for March 16, 2006, is an  
6 obligation for the principal amount of \$1,503,750, now looking  
7 at the third paragraph. We are highlighting the wrong thing  
8 here. Do you see that?

9 A. Yeah, and the second loan, sorry.

10 Q. And if you need a second to answer this you can, but there  
11 is no reference to any \$575,000 and change note from March  
12 2006, is there?

13 A. No. I think they were consolidated, though. It was, as I  
14 recall, how they were put together. There were the old loans  
15 and then the new ones. The new ones were the line of credit,  
16 which was, you know, 1.5 million.

17 Q. Okay. Let's look and see how these minutes changed after  
18 you send them to Glenn Sturm. Pull up Exhibit 19, please. And  
19 let's look at the second and third paragraphs again.

20 Do you see that now it says the trustees ratified  
21 three loans instead of two?

22 A. Yes.

23 Q. And it now refers to a third loan of \$575,895 in the second  
24 sentence of the third paragraph of this document, correct?

25 A. Okay. It replaces the original one dated October 1, so

L9L2Kle2

W. Eber - Cross

1 there was another one, too, from October 1, 2002, as well, and  
2 they got consolidated.

3 Q. Well, let's -- that's the same note as the \$575,895,  
4 Exhibit L, we were just looking at a few minutes ago, right?

5 A. Well, there was another one I think October 1, which this  
6 says, which replaced the original note dated October 1, 2002.

7 Q. Let's pull up Exhibit L, just so that we can clear up this  
8 confusion, and zoom in on the first paragraph of that.

9 Do you see there that it is that \$575,000 and change  
10 note that replaces in its entirety the promissory note dated  
11 October 1, 2002? So we are talking about the same thing,  
12 right?

13 A. Yes.

14 Q. Now, as of -- you are currently president of Eber Brothers  
15 Wine & Liquor Corp., correct?

16 A. Yes.

17 Q. And you have been an officer or director of that company  
18 most of the time since 2008, is that fair to say?

19 A. During the relevant periods, yes.

20 Q. Except for a period of time in around 2014 or 2015 when the  
21 entire board of directors resigned, correct?

22 A. Because we didn't have insurance, yes.

23 Q. And most recently, and we will talk about this more later,  
24 you actually amended the bylaws for Eber Wine & Liquor earlier  
25 this year, correct?

L9L2Kle2

W. Eber - Cross

1 A. Yes.

2 Q. So is it fair to say that you were familiar with the bylaws  
3 of Eber Wine & Liquor as they existed before the amendment?

4 A. It's a document that I had seen before, yes.

5 Q. And isn't it true that, according to the bylaws that were  
6 in place in 2002 through 2006, the company was prohibited from  
7 contracting any loans without board authorization?

8 A. Sorry. Can you repeat that?

9 Q. Isn't it true that Eber Brothers Wine & Liquor was  
10 prohibited from contracting any loans, taking any loans from  
11 anyone without board authorization?

12 A. I -- I wasn't aware of that. I mean, I -- I didn't -- I  
13 don't know if I have read them that carefully. I thought  
14 the --

15 Q. Let's pull up Exhibit 108 at page 10.

16 A. The will authorized loans.

17 Q. I have not asked you any questions about the will,  
18 Ms. Eber.

19 Let's do, yeah, number 2 there, under finance. Do you  
20 see that, it says at the top of what's blown up, "No loans  
21 shall be contracted on behalf of the corporation, and no bonds  
22 or notes shall be issued, unless authorized by the board or  
23 made by properly designated officers as shown on the corporate  
24 borrowing resolution"?

25 A. I'm reading that.

L9L2Kle2

W. Eber - Cross

1 Q. And isn't it true that you have never found any corporate  
2 borrowing resolution authorizing Lester to loan any money to  
3 any Eber Brothers company prior to February 2010?

4 A. I don't know.

5 Q. You don't know whether -- I'm just asking whether you found  
6 one?

7 MR. SANTORO: Objection, your Honor. She answered the  
8 question already.

9 THE COURT: I think so.

10 MR. BROOK: Okay.

11 I know there had been some concerns about water breaks  
12 for the witness. I know I could use one. Could we take five  
13 minutes, your Honor?

14 THE COURT: I can't make out what you are saying.

15 MR. BROOK: There has been some concern about getting  
16 water breaks, to step outside for the witness, and I know I  
17 could use one. Can we take five minutes, your Honor?

18 THE COURT: Okay. We will take ten minutes.

19 (Recess)

20 THE COURT: Okay. Let's continue.

21 BY MR. BROOK:

22 Q. Now, after Southern and Eber Brothers reached their deal in  
23 2007, there was a significant amount of winding up that had to  
24 happen in New York from that point forward, correct?

25 A. I wouldn't characterize it as them reaching a deal. Eber

L9L2Kle2

W. Eber - Cross

1 Brothers went out of business.

2 Q. Well, Eber Brothers signed no fewer than 15 different  
3 agreements with Southern Wine & Spirits in August 2007,  
4 correct?

5 A. It was out of business.

6 Q. I'm just asking if it signed the agreements. Is that  
7 correct?

8 A. After it went out of business, yes. And then it was --

9 Q. And then after that point, Eber Brothers continued to have  
10 to sell liquor and do other things to try to wind up its  
11 business in New York, correct?

12 A. By August of 2007, there was -- a liquidator had come, so  
13 it was -- had sold all of its inventory. It was out of  
14 business.

15 Q. Isn't it true that, in connection with the winding-up  
16 process, that Lester Eber spent substantially all of his work  
17 week in the New York City area during the 2008 fiscal year?

18 A. I don't -- I don't know. I mean . . .

19 Q. You don't know if that's true or not?

20 MR. SANTORO: Objection, your Honor. She asked the  
21 question -- she answered the question that was asked.

22 THE COURT: Proceed.

23 MR. BROOK: Let's pull up Exhibit 267 and go to page  
24 5.

25 I will represent that this is a very large document

L9L2K1e2

W. Eber - Cross

1 that is a waiver for the minimum funding of pension  
2 requirements in 2000 -- can you pull that down, Ali? It's a  
3 little bit high, blocking the top part. It's a declaration for  
4 2008.

5 Q. Do you see that?

6 A. Yes.

7 Q. And you remember signing this document under penalty of  
8 perjury?

9 A. Yes.

10 Q. Okay. Let's --

11 A. I thought it was for --

12 Q. -- take a look at page 275 of the document. And I am  
13 actually -- so just looking above the line first, so this is a  
14 page that shows how much money was paid to different executives  
15 for Eber Brothers Wine & Liquor for different fiscal years,  
16 2006 through 2009, correct?

17 A. Yes.

18 Q. And fiscal year 2008, just so we are on the same page, that  
19 would be June 1, 2007 through May 31, 2008, correct?

20 A. Sorry, which fiscal year?

21 Q. Fiscal year 2008 began on June 1, 2007, correct?

22 A. Yes.

23 Q. And ended May 31, 2008, correct?

24 A. Yes.

25 Q. So in that time period, according to this document, Lester

L9L2Kle2

W. Eber - Cross

1 was paid \$141,404 by Eber Wine & Liquor, correct?

2 A. I don't -- I know at some point they moved to the payroll,  
3 yeah, I assume so.

4 MR. BROOK: Okay. There is a footnote there, footnote  
5 2. Ali, would you please zoom in on footnote 2. It's the  
6 second. There you go.

7 Q. And do you see that footnote 2 says that this amount does  
8 not include payments in an aggregate amount equal to \$12,816  
9 made to Mr. Eber for apartment maintenance in New York City.  
10 These payments were required as the wind-up of the New York  
11 City operation required Mr. Eber to spend substantially all of  
12 his work week in the New York City area during the 2008 fiscal  
13 year.

14 Do you see that?

15 A. I do.

16 Q. And that was part of the submission that you gave to the  
17 IRS, correct?

18 A. Apparently it was.

19 MR. BROOK: You can close that, Ali.

20 A. I don't think that's an accurate statement.

21 Q. Well, actually, let's go ahead, pull up Exhibit 267 at 276  
22 while we are looking at it. Sorry. That's confusing page 276  
23 of 267.

24 So this is the page after the one we were just looking  
25 at. Can you zoom in on the top half of that, Ali.



L9L2Kle2

W. Eber - Cross

1           So this is showing that during those same years there  
2           were payments made to at least some of the same executives, you  
3           and your father, from Eber-Connecticut, correct? That's the  
4           first line compensation paid by Eber-Ct?

5           A. Yes.

6           Q. So in fiscal 2008, Lester was also paid \$195,272 by  
7           Eber-Ct, correct?

8           A. Which fiscal year? Because, you know, I'm not sure where  
9           these numbers are coming from. But on a W-2, that would be for  
10          a different fiscal year than the fiscal year of the company.

11          THE COURT: What was the company's fiscal year?

12          THE WITNESS: It's May 31.

13          THE COURT: And right there on the page it says "for  
14          the year ended May 31," does it not?

15          THE WITNESS: Okay, yes.

16          THE COURT: Okay.

17          BY MR. BROOK:

18          Q. Right. So just to clarify what you were saying, you are  
19          referring to the fact -- and this is apparent in some  
20          documents, your Honor -- that when you say fiscal year 2009,  
21          the IRS in its forms would call that fiscal year 2008, correct?

22          A. '8. Yes. It's confusing. And I have --

23          Q. Because you count from when the year ended and the IRS  
24          counts from when the year began, correct?

25          A. Yeah, it's always a year back.

L9L2Kle2

W. Eber - Cross

1 Q. Now, for the year of 2008, you were paid -- now I am  
2 talking calendar year, you were paid by both Eber Brothers  
3 Wine & Liquor and Eber-Connecticut, correct?

4 A. Well, this shows Connecticut, yes, and -- did the other  
5 one? I can't remember what the other dates were on the other  
6 one.

7 Q. Let's look at the W-2s so we can stay focused on the  
8 calendar year. That's Exhibit 158. We are going to be looking  
9 at the first and second pages, I believe.

10 So 2008 is in the middle there. So do you see that  
11 that shows that you were paid by Eber Wine & Liquor 50,834 in  
12 2008?

13 A. Yes.

14 Q. Is that a yes?

15 A. Yes.

16 Q. And as a general matter, if you could please try to speak  
17 up or speak into the microphone, it's very hard to hear you  
18 from back here.

19 Okay. If you could go to the next page, please, Ali,  
20 and at the bottom half. If you can scroll down.

21 And this shows that in the same calendar year 2008,  
22 you were paid, inclusive of 401K contributions, \$81,517 and  
23 change, correct?

24 A. \$78,000.

25 Q. Well, you know what -- looking in the middle right side

L9L2Kle2

W. Eber - Cross

1 there, you see box 12A, code D, that refers to 401K  
2 contributions, does it not?

3 A. Okay.

4 Q. And you see that those are counted towards Medicare and  
5 Social Security depending on the amount, correct?

6 A. Yes.

7 Q. All right.

8 Now, for your father, you have only provided us with  
9 one W-2 for 2008, is that right?

10 A. We looked for all of the documents that you requested.

11 Q. But is it correct that there was a W-2 issued to your  
12 father from both entities for 2008, you just could not find one  
13 of them?

14 A. We looked for whatever we could find. I don't -- I gave  
15 you what we had or what he had.

16 Q. Okay. So let's look at what you gave us for your father.  
17 Let's go to Exhibit 2008 -- I'm sorry, blah, blah. Let's go to  
18 I believe it is page 2 of Exhibit 28.

19 A VOICE: Two eight?

20 MR. BROOK: Yes. In the middle there at the top.

21 Q. So we can see that there is a payment recognized from  
22 Eber-Connecticut only, is that right?

23 A. It says Eber-Connecticut, yes.

24 Q. And you looked for one from Eber Wine & Liquor and you  
25 could not find one, correct?

L9L2Kle2

W. Eber - Cross

1 A. This is from 2008. Is this from --

2 Q. Yeah. Ali, can you zoom in not quite as much, please. Get  
3 the whole thing there.

4 All right. So looking at the amount, \$189,788,  
5 inclusive of I guess that's everything, does that seem like the  
6 correct amount of money that your father was paid in calendar  
7 year 2008?

8 A. From Eber-Connecticut, yes.

9 Q. And based on that amount, is it fair to infer that there  
10 was an amount that was paid to your father from Eber Wine &  
11 Liquor just as there was for you?

12 MR. SANTORO: Objection, your Honor.

13 THE COURT: Overruled.

14 A. I gave you what we -- I mean, did you go back to his tax  
15 return? Because I think we gave you the tax return, too.

16 Q. Isn't it true that your father did not reduce the amount  
17 that he was paid until the last quarter of 2009 or thereabouts,  
18 last quarter of fiscal 2009, so in calendar year 2009?

19 A. I don't recall the exact dates. I know he did take some --  
20 he did take pay cuts and reduced his salary. You know, it is  
21 hard for me to know exactly when that happened, but . . .

22 Q. Just so we can be clear here and don't lose a lot of  
23 money --

24 A. I know in 2012 he did. But part of that could be that this  
25 is a W-2, you know, covering, you know, January to December,

L9L2Kle2

W. Eber - Cross

1       whereas our fiscal year, like we said, was June to May, so  
2       maybe he took it later on or in a different -- like the time  
3       periods didn't exactly correspond. So unless you are looking  
4       at like apples to apples --

5       Q. Let's take a look at what you said to the IRS. Let's go  
6       back to Exhibit 267 at page 279. Let's blow up the first few  
7       lines of the last paragraph.

8               Do you see there it says, "During the last fiscal  
9       quarter of fiscal year 2009, Eber-Connecticut decreased its  
10      expenses by more than \$1 million"?

11      A. No, I don't --

12      Q. "These cost cutting measures included downsizing the sales  
13      management team and" --

14              THE COURT: Counselor?

15              MR. BROOK: Sorry. You can read, I guess.

16              THE COURT: You are a 45 r.p.m. record, if anybody  
17      knows what that is, being played at 78 r.p.m.s.

18      BY MR. BROOK:

19      Q. All right. So looking at the third sentence, after talking  
20      about reducing executive compensation, it says, "Indeed,  
21      Mr. Eber has agreed to decrease his annual compensation by  
22      \$150,000 to an amount equal to \$186,675." And then it says  
23      that the benefit will be recognized during physical year 2010.  
24      Do you see that?

25      A. So our fiscal year 2010, the company's fiscal year 2010.

L9L2K1e2

W. Eber - Cross

1 So it -- yeah. Is that what --

2 Q. Just so we are clear, the last fiscal quarter of fiscal  
3 2009, we are talking about the months of March, April, and May  
4 2009, so after 2008, correct, when is the last fiscal quarter  
5 of your year? What months does that encompass?

6 A. March, April, May.

7 Q. Okay.

8 Let's also look, just to try to close this, Exhibit  
9 142, interrogatory response number 1, do you see that the  
10 second line there says that in identifying all of the sources  
11 of income, he was paid by Eber Brothers, Southern Wine &  
12 Spirits and Eber-Connecticut in 2008?

13 A. Yes.

14 Q. All right. And now let's go to Exhibit 160 at page 81 and  
15 let's blow up count 40 to 80, third one down. No, no, above  
16 that. And if you are able to make that more readable, that  
17 would be great.

18 So we are again looking at the general ledger for Eber  
19 Wine & Liquor, and this is the count covering officers'  
20 salaries. Do you see that?

21 A. So this is -- yes.

22 Q. And the officers of Eber Brothers at this point, after --  
23 it starts August 30 -- let me pull back.

24 This starts August 2007, correct?

25 A. Yes.

L9L2Kle2

W. Eber - Cross

1 Q. And it goes through June 2008, correct?

2 A. Yes.

3 Q. And the officers of Eber Wine & Liquor were you and your  
4 father, is that correct?

5 A. Yes, and it may have included administrative assistant. I  
6 don't know. I mean, I'm -- I didn't put this together. I  
7 wasn't doing payroll. So there could have been other people  
8 involved in this. I don't know.

9 Q. Well --

10 A. I don't know exactly who this covers, so.

11 Q. We will stipulate that there are other payroll expenses on  
12 this general ledger. I am just referring to officers.

13 Putting aside this exhibit, who were the officers of  
14 Eber Brothers Wine & Liquor during this time period?

15 A. My father and myself. But I don't know if this didn't also  
16 include other people as well because there were some other  
17 people.

18 THE COURT: So if they included other people, then the  
19 description of the account is incorrect, is that right?

20 THE WITNESS: It could be, yes.

21 THE COURT: Well, no, if they included somebody who  
22 wasn't an officer, then it was not an accurate account  
23 description, right.

24 THE WITNESS: Yes, right.

25 THE COURT: And if the contract description was

L9L2Kle2

W. Eber - Cross

1 accurate and adhered to, it doesn't include anybody else,  
2 right?

3 THE WITNESS: Right.

4 THE COURT: Okay. We don't have to worry about the  
5 New York Mets' payroll being in here.

6 MR. BROOK: Ali, I believe we have prepared a  
7 demonstrative to try to combine the information we have looked  
8 at. This is defense -- I'm sorry, not defense. It's  
9 Demonstrative 01, D01. This is combining what we have just  
10 looked at. You can zoom in on that.

11 Q. So the information that we were just looking at on page 81  
12 shows a total of \$204,661 in officers' salaries, and that's net  
13 of any credits.

14 And if you can go to the next part, Ali, just show the  
15 whole thing, I don't think there is a need to zoom here, and  
16 then it says the amount you were paid in 2008, we were just  
17 looking at this, was \$50,834, meaning there is \$153,000 and  
18 change that is unaccounted for. Does that not sound right to  
19 you?

20 A. You said -- sorry?

21 Q. Does that math sound right to you?

22 A. Yes, the math.

23 Q. So combining that amount with the under \$200,000 that your  
24 father was paid from Eber-Connecticut, does that sound like  
25 approximately the right amount for his salary in 2008, roughly



L9L2Kle2

W. Eber - Cross

1 \$350,000?

2 A. I don't know offhand. I don't know these numbers offhand.  
3 Because there were other employees there as well.

4 Q. Well, I guess let's do one thing just to clean this up. It  
5 actually just occurred to me. Ali, can you go back to Exhibit  
6 267 at page 275. So actually this lists -- even though Mike  
7 Gumaer was only a director not an officer, correct?

8 A. Sorry?

9 Q. Mike Gumaer, Elliot Mike Gumaer, he was a director of Eber  
10 Brothers?

11 A. Yes.

12 Q. He was not technically an officer, correct?

13 A. Correct.

14 Q. But it says here that he was paid \$22,000 a year for the  
15 years ending in 2008 and 2009, correct?

16 A. Correct.

17 Q. Is that a yes?

18 A. Correct.

19 Q. So if we were to -- I'm not going to do it on the fly, but  
20 if you subtract \$22,000 from roughly \$150,000, you end up with,  
21 what is it, \$128,000?

22 A. Yes.

23 Q. I'm sorry, \$328,000 if you -- I have gotten myself  
24 completely confused. Please allow me to start that over again.

25 So looking on the right side of the screen right now,

L9L2Kle2

W. Eber - Cross

1 we see that the reported salary for Lester Eber was \$336,675,  
2 correct?

3 A. In 2006.

4 Q. And in 2007, correct?

5 A. Yes.

6 Q. And then what we were looking at before showed that, in  
7 2008, Eber-Connecticut paid your father \$189,000 and change, so  
8 he got about 190?

9 THE COURT: Sorry. Was that from --

10 Q. Sorry. Let's go back to Exhibit 28, page 2. Okay.

11 You see it is 189,788, so let's call that \$190,000,  
12 okay?

13 A. Yes.

14 Q. Then let's go back to Demonstrative 1, and we can see that  
15 the difference was roughly \$154,000. So if we subtract \$22,000  
16 from Mike Gumaer, we end up with 132, which if we add to  
17 \$190,000 ends up being 2 -- sorry, 322,000. Does that sound  
18 about right?

19 MR. SANTORO: Objection, your Honor.

20 A. I can't follow.

21 MR. SANTORO: To the extent that he is asking the  
22 witness to perform a mathematical calculation, I don't know the  
23 relevance.

24 THE COURT: Overruled.

25 A. So can you repeat the question?

L9L2Kle2

W. Eber - Cross

1 Q. Sure. So we saw Lester was typically getting -- let's  
2 forget what he was typically being paid.

3 He was being paid \$190,000 by Eber-Connecticut in  
4 2008, correct?

5 A. Yes. He was paid -- I thought it was 180-something.

6 Q. \$189,000 and change.

7 A. All right.

8 Q. Let's call it 190. We will subtract elsewhere to make sure  
9 it's tare. Let's say according to this it was \$153,000, we  
10 will round down, is the difference between what you were paid  
11 and what was unaccounted for in the general ledger.

12 A. Yes, but I don't know if there were other salaries included  
13 in this or if it was just Lester.

14 THE COURT: We have run that track a few times  
15 already.

16 THE WITNESS: Okay.

17 Q. So if we take another step here, it's not on the screen,  
18 maybe we can, and we subtract 22, we subtract 22,000, we end up  
19 with, what is it, let's call it -- let's round down, 131,000.

20 A. Okay.

21 Q. Which if we then add that to the \$190,000 that we round  
22 that up to, we end up with \$321,000, correct?

23 A. Yes.

24 Q. That is approximately the exact same amount that Lester  
25 Eber was paid in calendar years 2006 and 2007. Pull up Exhibit

L9L2Kle2

W. Eber - Cross

1 2000 -- sorry Exhibit 28, pages 1 and 2. Nope. Not that one,  
2 left one.

3 So that year, with his 401K, it says he was paid three  
4 hundred eighteen five. That was very close to what we just  
5 calculated if we consider the officers as including Mike  
6 Gumaer, correct?

7 A. Yes.

8 (Continued on next page)

L9LsKLE3

Cross - W. Eber

1 BY MR. BROOK:

2 Q. And isn't it true that there was, in addition to what was  
3 reported on a W-2 for 401(k) contributions, that Eber Brothers  
4 did 401(k) matching?

5 A. It did do some matching, yes.

6 Q. OK. Would that explain the difference between the amount  
7 reported here on the W-2 and the amount that you reported to  
8 the IRS on Exhibit -- you can put it up -- 267, page 275?

9 A. I don't know.

10 Q. You don't know?

11 A. I don't know.

12 MR. BROOK: OK. We can move on to something else.

13 Let's take this down, Ali.

14 Q. Now, isn't it true that right at the end of August 2007,  
15 your father had Lisa Semenik, the CFO, at that time, change the  
16 company's pension plan to allow him to start receiving his  
17 pension?

18 A. I don't quite recall. There may have been something done,  
19 but I'm not sure when he started receiving his pension.

20 Q. But you do remember he started receiving his pension before  
21 he quit Eber Brothers, correct?

22 A. I don't remember. I mean, I wasn't involved in that.

23 Q. Take a look at Plaintiffs' Exhibit 162.

24 You recognize the name Lisa Semenik at the bottom?

25 A. Yes.

L9LsKLE3

Cross - W. Eber

1 Q. And she was the chief financial officer and board member  
2 prior to you?

3 A. She was.

4 Q. All right. Then let's look at the amendment. It says  
5 Section 5.13. It's the block there in the middle there, Ali.

6 So it says, This is a plan amendment being done --  
7 just to look at the date also there, Ali, if you can blow it  
8 up -- below it in witness thereof. That's fine.

9 Effective September 1, 2007, do you see that?

10 A. Yes.

11 Q. So that's the point where you say, Eber Brothers Wine &  
12 Liquor was done, correct?

13 A. Wait. Can I just read this for a second?

14 Q. Sure.

15 A. OK.

16 Q. All right. So having read this, let's just summarize  
17 rather than read. Is it fair to say that this amendment  
18 allowed someone who was going to continue working for Eber  
19 Brothers Wine & Liquor to start receiving their pension early  
20 as long as they had achieved a normal retirement age?

21 A. That's what it says, but it -- you know, the company didn't  
22 really have any operations after that point. So I -- you know,  
23 I'm not that familiar with exactly what needed to be done. So,  
24 you know, I'm assuming she did what --

25 Q. I'm not asking you to assume what she was thinking.

L9LsKLE3

Cross - W. Eber

1 A. OK. You know, I don't -- I don't really know all the  
2 details of this. I wasn't involved in it.

3 Q. My question is going to be -- please listen -- were there  
4 any other employees of Eber Brothers Wine & Liquor besides your  
5 father who were planning to keep working for their employer  
6 Eber Wine & Liquor after September 1, 2007?

7 A. I'm sorry.

8 Q. And who had already achieved retirement age?

9 A. Well, I know Mark Shevlin was there too.

10 Q. How long did he continue working for Eber Wine & Liquor  
11 after September 1, 2007?

12 A. Well, he was in HR. I don't remember exactly.

13 Q. Is it correct that when your father began to receive his  
14 retirement -- I'm sorry -- his pension payments early, he was  
15 paid cash?

16 A. It wasn't early. He was already 70, so I think you qualify  
17 when you're 55 or something.

18 Q. All right. So let's say it would have been early before  
19 this amendment we're looking at, though, right?

20 A. Well, it would have been, you know, if he was still working  
21 for the company. I mean, the company was essentially closed,  
22 so ...

23 Q. And --

24 A. You know, I'm not, obviously, a lawyer, so I don't know.

25 Q. I'm not asking you --

L9LsKLE3

Cross - W. Eber

1           What was the amount of your father's pension on a  
2 monthly basis?

3       A. I think maybe nine or 10,000, maybe 7,000. I think it was  
4 between seven and something. 10,000 maybe.

5       Q. OK. So between seven and 10,000 maybe?

6       A. Perhaps. I don't recall the exact amount. I know that the  
7 plan was frozen, so...

8       Q. So the amounts didn't change, is that your understanding?

9       A. Right.

10      Q. Let's pull up Defense Exhibit DDDD. 4Ds.

11           Ali, it's the wrong exhibit. There you go. It's hard  
12 to read this scan. This is one that we just got less than two  
13 weeks ago. Can you zoom in on that first e-mail? I think it's  
14 in there.

15           All right. I'm going to try to read this because it  
16 is nearly illegible, at least part of it. Correct me if you  
17 think I'm saying anything wrong, Ms. Eber.

18           Is this e-mail from Michael Gallagher copying you,  
19 correct?

20      A. Yes.

21      Q. It's copying someone from *groom.com*, correct?

22      A. Yes.

23      Q. Those were your lawyers in connection with the dispute with  
24 PBGC, correct?

25      A. Yes.



L9LsKLE3

Cross - W. Eber

1 Q. Some of the lawyers?

2 A. The lawyers.

3 Q. And it says here in the middle paragraph, also Michael  
4 Gallagher was the actuary for your plan, is that right?

5 A. Yes.

6 Q. So he kept track of what each person was entitled to  
7 receive, is that fair?

8 A. Well, he was involved in calculating -- you know, he worked  
9 with the company and he was involved in calculating the  
10 benefits. Mark Shevlin also worked for the company in human  
11 resources, and he also kept track of, you know, benefits.

12 Q. OK. So let's see. So he says here, Lester's current  
13 benefit -- this is in 2014 -- is \$10,860 a month payable as a  
14 50 percent J and S benefit.

15 Do you know what that means?

16 A. Yeah. It means joint and survivor benefit, so a part of  
17 that would be for my mother.

18 Q. If he died, correct?

19 A. If he died and if he actually got the benefit. I mean, he  
20 ended up waiving it.

21 Q. Right. But according to this, the last part of this  
22 highlighted section says the benefit started on September 1,  
23 2007.

24 Do you see that?

25 A. Yes.

L9LsKLE3

Cross - W. Eber

1 Q. You don't have any reason to believe that Mr. Gallagher was  
2 providing you with incorrect information?

3 A. No.

4 Q. You can take that down.

5 For most of his career, isn't it true your father, to  
6 the best of your knowledge, did not have any written employment  
7 agreement with any of his companies?

8 A. I wasn't aware of -- you know, I came into Eber Brothers in  
9 20 -- you know, August, September of 2007. So I don't know  
10 what he had.

11 Q. So that is why when I asked you during your deposition  
12 whether your father had ever had a written employment  
13 agreement, you said there may have been, but you don't  
14 remember, is that right?

15 A. I don't recall exactly what I said during the deposition,  
16 but, you know ...

17 Q. It's correct, is it not, that in April 2012 you granted  
18 your father an employment agreement with Eber-Connecticut?

19 A. Yes. He did have an employment agreement with  
20 Eber-Connecticut.

21 Q. Let's pull that up. It's Exhibit 180. Flip to the last  
22 page.

23 You were the one who authorized this on behalf of  
24 Eber-Connecticut?

25 A. And I believe it was -- yes, and I believe it was approved

L9LsKLE3

Cross - W. Eber

1 by the board.

2 Q. And you have no documentary evidence that shows it was ever  
3 approved by the board, do you?

4 A. I believe it was.

5 THE COURT: Could you please answer the question you  
6 were asked, Ms. Eber?

7 A. I -- sitting here, I don't know.

8 Q. OK.

9 A. But I assume it was.

10 THE COURT: But what?

11 THE WITNESS: I assume it was approved by the board.  
12 I'm not looking at the document right now.

13 Q. Is it correct that this is not a document that you  
14 disclosed to me when I asked you about employment agreements  
15 when I was deposing you as Eber-Connecticut's corporate  
16 representative?

17 A. I provided the information the attorneys said that I needed  
18 to provide. So I gave whatever they -- you know, whatever they  
19 requested, I gave to them.

20 Q. You did give me a copy or me and my clients a copy of your  
21 own employment agreement dated August 2012, correct?

22 A. If you requested it, I gave it to you, yes.

23 Q. Not any more than this document, but I shouldn't be  
24 testifying, so ...

25 Is it correct that as a result of this employment

L9LsKLE3

Cross - W. Eber

1 agreement, Exhibit 180, after Lester passed away last year, his  
2 estate received a deferred compensation amount of three times  
3 his salary and bonus?

4 A. Yes.

5 Q. Have there been any other payments to his estate since he  
6 died?

7 A. No.

8 Q. I want to focus you on the first page, the section one  
9 positions and duties.

10 We can blow up that whole thing, both A and B, Ali.

11 THE COURT: Counselor, just a point of information.  
12 Is Lester Eber's will in evidence?

13 MR. BROOK: It has been offered and it has been  
14 objected to, your Honor. I contend it goes to motive and bias.  
15 The defense has their objection, I believe, on relevance  
16 grounds.

17 THE COURT: Why isn't that so -- why isn't it relevant  
18 on motive and bias?

19 MR. SANTORO: On motive and bias as to whom?

20 I'm not sure I understand.

21 THE COURT: For one thing, this witness, possibly --

22 MR. SANTORO: We don't think it is relevant to the  
23 issues presented and the motive and bias of this witness. I  
24 still don't connect it.

25 THE COURT: That's a really rather remarkable

L9LsKLE3

Cross - W. Eber

1 statement.

2 MR. BROOK: Why don't we go to that will and take a  
3 quick look at that.

4 THE COURT: Yes. Let's do that.

5 MR. BROOK: Exhibit 175, please.

6 We don't need that first part. Zoom out, actually. I  
7 don't know this document like the back of my hand because we  
8 only got it recently.

9 Let's go to the fifth section.

10 BY MR. BROOK:

11 Q. So this is the part where your father said, I give and  
12 bequeath all of my business interests of any kind and where so  
13 ever situate -- situated, I assume -- including stock in Eber  
14 Brothers Wine & Liquor, Metro Inc., Eber-Connecticut LLC,  
15 Slocum & Sons, and Alexbay LLC, or any other business entity  
16 I am involved with at the time of my death, to my daughter,  
17 Wendy Eber.

18 So did I read this correctly, Ms. Eber?

19 A. Yes.

20 Q. And you do have a brother, do you not, David Eber?

21 A. I do.

22 Q. And he was entitled to receive an equal share of everything  
23 else under your father's will as you, correct?

24 A. Yes.

25 Q. And your brother was also, he was involved in the Wine &

L9LsKLE3

Cross - W. Eber

1 Liquor for most of his life, was he not?

2 MR. SANTORO: Objection, your Honor, relevance.

3 THE COURT: Sustained.

4 Now, I hope this isn't a sensitive subject, but is the  
5 witness's mother still with us?

6 MR. SANTORO: She's in the courtroom, your Honor.

7 THE COURT: Very much so.

8 Is her will in evidence?

9 MR. BROOK: Her will is not in evidence, and I do  
10 believe -- all I can say is this. Their are separate lawyers  
11 for my clients representing them in the estate matter. My  
12 understanding is that Lester's will requested that his  
13 ex-spouse or his widow forego her one third election under  
14 New York law. I believe the last thing I heard from those  
15 attorneys is that she is making her one third election. There  
16 is some question as to exactly where that goes. It is beyond  
17 my knowledge and expertise.

18 THE COURT: I'm sorry?

19 MR. BROOK: All that estate stuff, spouse's one third  
20 election is well beyond anything I can speak to intelligibly.

21 THE COURT: The question that might be useful to  
22 address is whether the witness also had an interest in the  
23 deferred compensation that was paid pursuant to the employment  
24 agreement with Lester Eber and Eber-Connecticut.

25 MR. BROOK: If we pull that back.

L9LsKLE3

Cross - W. Eber

1 Q. I mean, I think, correct me if I'm wrong, Ms. Eber, you're  
2 the executor of your father's estate, correct?

3 A. I am.

4 Q. And as far as the -- I want to call it golden parachute,  
5 what do you call it -- the deferred compensation that he was  
6 paid after he died, is that how you refer to it?

7 A. Death benefit?

8 Q. The death benefit.

9 Are you treating that as executor as part of your  
10 father's business interest or part of his residuary estate?

11 MR. SANTORO: Objection, your Honor.

12 THE COURT: Overruled.

13 A. I believe it is part of the residuary.

14 THE COURT: I'm sorry. You believe?

15 THE WITNESS: It is part of the residuary.

16 THE COURT: The question was: How you are treating it  
17 in your role as executor of the estate?

18 THE WITNESS: As residuary.

19 THE COURT: All right. Thank you.

20 BY MR. BROOK:

21 Q. Depending on whether your mother takes an election or not,  
22 you would get between one third and one half of that amount  
23 that was paid to your father as a death benefit, correct?

24 A. It depends if there is anything left. I mean, if --

25 Q. Right. I mean, I'm assuming that this lawsuit didn't

L9LsKLE3

Cross - W. Eber

1 exist?

2 A. I mean, there is legal fees, there's, you know ...

3 Q. OK. Let's go back to Exhibit 180. Let's zoom in on that  
4 section one, positions and duties.

5 Just so we're not playing unfair here, this is not a  
6 document that you personally drafted, correct?

7 A. I'm sorry. Which document is this?

8 Q. Is this the employment agreement you signed in April 2012  
9 for your father?

10 A. Yes.

11 Q. OK. As position and duties, let me step back.

12 One of the things you testified about in your  
13 statements is what different kinds of compensation arrangements  
14 and contracts are reasonable and customary in your opinion,  
15 correct?

16 A. I believe so, yes.

17 Q. OK. So the first paragraph here states that your father  
18 would be employed as chief executive officer of the company and  
19 that he would report to the board and have duties and  
20 responsibilities consistent with that, correct?

21 A. Yes.

22 Q. That's a fairly reasonable and customary description of  
23 position and duties, would you agree?

24 A. Yes.

25 Q. And then the very next paragraph is a provision providing



L9LsKLE3

Cross - W. Eber

1 for your father to be indemnified and held harmless under a  
2 variety of different circumstances, correct?

3 A. It's in 1(b).

4 Q. Talking about 1(b), yes. This is one of his positions?

5 A. I haven't read it all.

6 Q. All right. And in particular, I want to direct your  
7 attention to the last couple of sentences in this.

8 This contract that you gave your father says that any  
9 act or failure to act, based upon authority given pursuant to a  
10 resolution, duly adopted by the board or based upon the advice  
11 of counsel for the company or any affiliate thereof, shall be  
12 conclusively presumed to be done, or omitted to be done, by  
13 executive in good faith and in the best interest of the company  
14 or any affiliate thereof.

15 Just focusing on that sentence, is it also your  
16 opinion that that is a reasonable and customary provision in an  
17 employment contract?

18 A. This was written by the lawyer, so ...

19 Q. Then the last sentence says, The company agrees that it  
20 shall advance expenses to or on behalf of the executive in  
21 connection with the company's obligations pursuant to this  
22 section.

23 Do you see that?

24 A. Yes, I see that.

25 Q. And has Eber-Connecticut been advancing your father's

L9LsKLE3

Cross - W. Eber

1 expenses in connection with this litigation?

2 A. With this litigation?

3 Q. Yes.

4 THE COURT: I couldn't hear your answer.

5 A. I'm sorry, no. Bankrupt the company.

6 Q. In the event that your father is held liable in any regard,  
7 is it your intention to make a payment to his estate equal to  
8 the amount of his liability pursuant to this section?

9 MR. SANTORO: Objection, your Honor.

10 THE COURT: Grounds?

11 MR. SANTORO: Speculation and relevance.

12 THE COURT: I think it is appropriate. If she has an  
13 intention, she will tell us. If not, she won't.

14 A. What was the question? Can you just repeat the question?  
15 I'm a little confused.

16 THE COURT: Repeat the question.

17 BY MR. BROOK:

18 Q. Is it your intention, either in your capacity as  
19 executor -- let me break this up into two separate parts.

20 In your capacity as executor of Lester Eber's estate,  
21 is it your in intention to seek indemnification for any  
22 liability he receives in this case pursuant to this employment  
23 contract?

24 A. You mean the legal fees?

25 Q. Legal fees or liability.

L9LsKLE3

Cross - W. Eber

1 A. I mean --

2 Q. Damages.

3 A. I'm sorry. I'm not -- can you just explain to me again?

4 Q. Do you know what indemnification is?

5 A. Yes.

6 Q. OK. So is it your intention, as executor of Lester Eber's  
7 estate, to seek indemnification from Eber-Connecticut for any  
8 legal fees or damages that are incurred as a result of this  
9 litigation we're in right now?

10 A. Well, no. I mean, I --

11 Q. Is that no?

12 THE COURT: Ms. Eber, have you finished your answer?

13 THE WITNESS: I don't know. You know, I -- right now,  
14 the estate is paying the legal fees.

15 Q. Who are the current members of the board of managers of  
16 Eber-Connecticut?

17 A. Um, right now the current managers are myself, um, Eric  
18 Fry, and Jeff Slocum.

19 Q. Eric Fry is your husband, correct?

20 A. He is.

21 Q. Aren't there supposed to be five managers on the board?

22 A. I don't recall how many.

23 Q. In the past there have been five managers, though, correct?

24 A. Yes.

25 Q. Just make sure I heard you correctly. You said Jeff

L9LsKLE3

Cross - W. Eber

1 Slocum?

2 A. Jeff, I think --

3 Q. There are a number of different Slocums, correct?

4 Until recently, about two years ago, John Slocum was  
5 actively working for the business, correct?

6 A. He was working for the business, yes.

7 Q. Was he the general manager?

8 A. He was VP of sales.

9 Q. VP of sales.

10 Who is now the VP of sales?

11 A. We have Owin Conners. Owin Conners.

12 Q. Is there a general manager as well?

13 A. No.

14 Q. Who is the number two person in the company after you?

15 A. Wally Crumb.

16 Q. He's the CFO?

17 A. Yes.

18 Q. Who are the other officers of Eber-Connecticut that you  
19 haven't mentioned yet, if any?

20 A. I've mentioned them all.

21 Q. I'm sorry. You really need to speak up.

22 A. You know, Wally Crumb is the CFO.

23 Q. Is there a COO or anything like that?

24 A. He's the CFO and the COO.

25 Q. OK. So if you were to make a request for indemnification

L9LsKLE3

Cross - W. Eber

1 in your capacity as executor of Lester Eber's estate for  
2 indemnification, who would decide whether or not to make that  
3 payment?

4 MR. SANTORO: Objection, your Honor.

5 THE COURT: Sustained.

6 Q. All right.

7 THE COURT: Are we getting close, counselor?

8 MR. BROOK: Unfortunately not, your Honor. I will try  
9 to trim things down.

10 THE COURT: The witness has asked for a break. We'll  
11 take ten minutes.

12 MR. BROOK: OK.

13 (Recess)

14 THE COURT: Let's continue.

15 Do try to condense, Mr. Brook.

16 MR. BROOK: I've spent the break crossing things off.

17 THE COURT: Let's continue.

18 MR. BROOK: All right.

19 BY MR. BROOK:

20 Q. Ms. Eber, in your declaration you testify about how, based  
21 upon your finance and accounting background, you were generally  
22 not optimistic about Eber-Connecticut for a significant period  
23 of time, is that right?

24 A. We lost \$7 million. Yes.

25 Q. What period of time specifically are you talking about when

L9LsKLE3

Cross - W. Eber

1 you were not optimistic?

2 A. Well, in my declaration, I think it was from 2006, '7,  
3 through 2000 -- you know, it went on. Specifically,  
4 Eber-Connecticut lost \$7.2 million, I believe.

5 Q. I'm just asking for the time period. Approximately when is  
6 the time period --

7 Let me rephrase it this way. At what point in time  
8 did you start to become optimistic about Eber-Connecticut's  
9 future?

10 A. Well, I actually did do a discounted cash flow, which I put  
11 into the -- my statement.

12 Q. I'm not asking for that.

13 A. Well, but that -- you did ask me, though, about when --

14 THE COURT: He asked you when, Ms. Eber. And this  
15 isn't like a political campaign where the candidate's objective  
16 is to say something loosely related to a question and then to  
17 go on and talk about whatever he wants to talk about. That  
18 seems to be the drill.

19 This is an answer to the question and the question was  
20 when. And either you have a general idea of when or a  
21 particular idea of when or you don't remember or you disagree  
22 with the premise that you ever became optimistic, but that's  
23 the nature of the answer, something along those lines.

24 A. You know, it was very -- it's very uncertain. I don't  
25 think there was specific date at which I know. Just the last

L9LsKLE3

Cross - W. Eber

1 year with COVID, it became -- we had an increase in sales, but  
2 it's been a struggle for a long time.

3 Q. All right. Is it fair to say that you were not optimistic  
4 until sometime after the calendar year 2012 ended?

5 A. I don't know if I've ever been that optimistic.

6 Q. OK. So that includes April 2012, you were not optimistic  
7 about Eber-Connecticut's future?

8 A. Yeah, I was not optimistic.

9 Q. But that's when you gave your father a new employment  
10 contract with a death benefit, correct?

11 A. It was in April of 2012.

12 Q. Isn't it true that during the time period of, say, 2009  
13 through 2012, you repeatedly expressed optimism about  
14 Eber-Connecticut's future to numerous different people and  
15 organizations?

16 A. The financial situation of the company was -- it was in  
17 financial distress during that time. And I was trying to, you  
18 know, make arguments that it would, you know, to the bank,  
19 because they were going to leave us and other organizations.  
20 But the company itself was going through tremendous financial  
21 distress.

22 THE COURT: Ms. Eber, you know, if you think you're  
23 helping yourself this way, I suggest you reconsider and just  
24 answer the questions. Your lawyer gets a chance on redirect to  
25 ask you anything else. But this is going to go on for a long

L9LsKLE3

Cross - W. Eber

1 time if what you do is sidestep all the questions.

2 A. All right. Are you going to ask --

3 MR. BROOK: I think that was a relatively responsive  
4 answer, not to disagree.

5 THE COURT: I'm happy for you.

6 Q. Is what you're saying then, is you said something different  
7 to banks and others than what you really believed, is that  
8 right?

9 A. Well, I -- you know, I was trying to be optimistic with the  
10 bank. Yes, yes.

11 Q. All right. So let's look at some of that.

12 The bank we're talking about here is Canandaigua  
13 National Bank, or CNB, correct?

14 A. Yes.

15 Q. And they, in addition to being a co-trustee of the trust,  
16 they were also the primary lender to Eber-Connecticut from 2007  
17 or so until 2017, correct?

18 A. Yes.

19 Q. All right. During that time period, Eber-Connecticut --  
20 I'm sorry -- CNB, through Bob Lowenthal as the loan officer,  
21 repeatedly expressed his desire to get out of a loan, correct?

22 A. Yes.

23 Q. They wanted you instead to find an asset-based lender who  
24 could loan you more money, correct?

25 A. Any lender. They wanted us to find anybody.



L9LsKLE3

Cross - W. Eber

1 Q. But didn't he specifically try to help you find an  
2 asset-based one?

3 A. He didn't help me find anyone.

4 Q. Is it fair to say that you repeatedly asked CNB to extend  
5 the loans that they were giving you past the early maturity  
6 dates?

7 A. We asked for extensions, yes.

8 Q. And you repeatedly got them, too, correct?

9 A. We did get extensions, yes.

10 Q. And isn't it correct that by July of 2011, you told Bob  
11 Lowenthal that you were confident that Eber-Connecticut was  
12 turning the corner and would be profitable in 2012?

13 A. I don't recall that specific conversation.

14 Q. Exhibit 232, let's look at that last sentence of the first  
15 paragraph.

16 Here, in an e-mail to Bob Lowenthal dated July 1,  
17 2011, copying your father and attaching some financial  
18 information that you didn't produce to us, you said, we are --

19 Can you go back, Ali.

20 You said, We are confident that we are turning the  
21 corner and will be profitable in 2012, correct?

22 A. It's written there, but we weren't.

23 Q. So is it your testimony that you were lying to  
24 Mr. Lowenthal?

25 A. No. No.

L9LsKLE3

Cross - W. Eber

1 Q. OK. So what you're saying then is that, ultimately,  
2 despite the optimism and confidence, there was not a profit  
3 realized in 2012, is that right?

4 MR. SANTORO: Objection, your Honor.

5 THE COURT: What's the objection?

6 MR. SANTORO: What she is saying there is what is  
7 written on the document.

8 MR. BROOK: I'm asking her to clarify her testimony  
9 now.

10 THE COURT: I'll sustain an objection to the form of  
11 the question.

12 BY MR. BROOK:

13 Q. So did I understand your answer a moment ago correctly,  
14 Ms. Eber, as saying that Eber-Connecticut was not profitable in  
15 2012?

16 A. It was not profitable in 2012.

17 Q. OK. But well before the end of 2012, Eber-Connecticut had,  
18 in fact, turned the corner and was realizing profits, correct?

19 A. No.

20 Q. Exhibit 250. Actually, we want to go to the third  
21 paragraph starting with "I have sent."

22 Keep the whole thing visible, please, Ali.

23 MS. KRAL: No worries.

24 Q. All right. This is an e-mail now from you to Mike Gumaer,  
25 the director and co-trustee, copying your father, correct?

L9LsKLE3

Cross - W. Eber

1 A. Yes.

2 Q. It's dated November 19, 2012, correct?

3 A. Yes.

4 Q. And you're apparently attaching an e-mail to Bob Lowenthal  
5 of CNB, correct?

6 A. Is there an attachment?

7 Q. I wish there was, but this is how we got it.

8 A. OK.

9 Q. So isn't it correct that you told Mike Gumaer, you know,  
10 who's on the board of managers of Eber-Connecticut at the time,  
11 correct?

12 A. Yes.

13 Q. You told him you had a stellar October, your profits had  
14 increased by 200 percent, and we have turned the corner and the  
15 good news is that November continues to be strong.

16 So did I read that correctly?

17 A. You read that correctly.

18 Q. So by --

19 A. January was the problem.

20 Q. We just covered July 2011. You were confident that you  
21 were turning the corner, and by November 2012, you had turned  
22 the corner, correct?

23 A. I wasn't confident.

24 Q. OK. But right in the middle of that time period is when  
25 you agreed to transfer all of Eber-Connecticut that was owned

L9LsKLE3

Cross - W. Eber

1 by the trust out of the trust into your father, correct?

2 MR. SANTORO: Objection, your Honor.

3 THE COURT: Overruled.

4 A. Can you repeat the question?

5 Q. So we were just talking about how things changed during the  
6 time period from July 2011 until November 2012. Isn't it true  
7 that it was in the middle of that time period that you decided  
8 to permit your father to take all the trust's interest in  
9 Eber-Connecticut and put it into his own company?

10 A. No.

11 Q. What part of that is incorrect?

12 A. Well, I think it is a complete mischaracterization of --

13 THE COURT: What part of it is incorrect?

14 THE WITNESS: Well, my father -- I mean, my father had  
15 loaned millions of dollars into the company, and the company  
16 wasn't doing well. The company had sustained many years of  
17 losses, many, many years of losses. And so I don't think that  
18 this is -- from November 19, 2012, I don't think is accurate of  
19 what is going on. You know, he -- he basically -- I mean, it's  
20 a -- you know, he did foreclose on loans that he made into the  
21 company. But the company had -- was not doing well, and he had  
22 put millions and millions of dollars into it.

23 THE COURT: OK. I've heard you.

24 There was a time when you decided to permit your  
25 father to take all of the trust's interest in Eber-Connecticut

L9LsKLE3

Cross - W. Eber

1 and put it into his own company; true or false?

2 THE WITNESS: The board did decide to -- yes, we --  
3 you know, after we -- yes, it was -- it did go into Alexbay,  
4 yes.

5 THE COURT: And at what point in time was that  
6 decision made?

7 THE WITNESS: Well, he had millions of dollars of  
8 loans --

9 THE COURT: That's not what I asked you. Answer my  
10 question, please.

11 THE WITNESS: I'm sorry. Your question is what?

12 THE COURT: When did you make that decision?

13 THE WITNESS: Well, that decision was made with the  
14 board. There were multiple phone calls with --

15 THE COURT: I didn't ask about how many phone calls.  
16 I didn't ask with whom it was made. I asked when.

17 THE WITNESS: In June. It was --

18 THE COURT: Of what year?

19 THE WITNESS: Of 2012. '12.

20 THE COURT: Thank you.

21 THE WITNESS: So it was -- that's when the board  
22 resolution was signed. And he moved against the -- you know,  
23 it is March where he filed an action, and the board decided --

24 THE COURT: March of what year?

25 THE WITNESS: 2012.

L9LsKLE3

Cross - W. Eber

1 BY MR. BROOK:

2 Q. OK. Now, let's talk about the loans a little bit before we  
3 get into that stuff again.

4 In 2010, you and the board authorized a line of credit  
5 note for Lester Eber in the amount of \$1.5 million, correct?

6 A. Can you repeat the question?

7 Q. You authorized a line of credit note for your father to  
8 loan up to \$1.5 million to Eber-Metro in approximately February  
9 or March of 2010, correct?

10 A. We had been loaning. I think it originally started in  
11 2009.

12 Q. I'm just asking when it was authorized.

13 A. When it was -- yeah. Sorry. When it was authorized by the  
14 board?

15 Q. It was authorized by the board in approximately, again,  
16 February or March of 2010, correct?

17 A. Yes, yes.

18 Q. And is it correct that maturity date on that loan was  
19 December 31, 2011?

20 A. Yes. Sorry. When was it?

21 Q. December 31, 2011.

22 A. Yes.

23 Q. That's correct?

24 A. But it started, I think, back in 2009.

25 Q. OK.

L9LsKLE3

Cross - W. Eber

1 A. Original note started in 2009.

2 Q. So you're referring to there was a note that was dated  
3 October 2009, and then that note was predated in February 2010,  
4 correct?

5 A. Yes.

6 Q. And at that time in 2010 is when you and the board, with  
7 the assistance of Glenn Sturm, approved also granting security  
8 for that note in the form of all of the assets held by  
9 Eber-Metro, correct?

10 A. Yes. It was loaning a lot of money into the company, yes.

11 Q. And at the same time, approved Eber Wine & Liquor to that  
12 note, correct?

13 A. Yes. I think it was a little bit later.

14 Q. Now, isn't it correct that even before the maturity date of  
15 December 2011, you were already helping your father try to  
16 calculate how much interest was due on his note so that he  
17 could engage in foreclosure proceedings?

18 A. He had been loaning a lot of money into the company. It  
19 was a very, very risky loan, and he did ask for the amount of  
20 the interest and the amount of the loans.

21 Q. And you provided that to him, correct?

22 A. Yes.

23 (Continued on next page)

24

25

L9L2K1e4

W. Eber - Cross

1 BY MR. BROOK:

2 Q. And you provided that to his lawyer, David Belt?

3 A. Yes, I did provide that.

4 Q. And as a result of the information you gave them, Lester  
5 then, after transferring his interest to a company called  
6 Alexbay, made a demand -- let me rephrase that.

7 He made a proposal that he would exchange the debt  
8 that he had transferred to Alexbay and make it -- cancel it all  
9 out if he received all of Eber-Metro's stock from Eber Wine &  
10 Liquor, correct?

11 A. He, January 1, he made a proposal, yes. We discussed it  
12 with the board, and yes.

13 Q. I think you are confusing two different dates. You mean  
14 January 18 was the proposal, correct?

15 A. Yeah, I believe so, yes.

16 Q. And the 1st, you are referring to February 1st, which is  
17 when you had either a phone call or a meeting with Mike Gumaer  
18 and your father to discuss his resignation, is that right?

19 A. We had a phone call with him, yes.

20 Q. And it is your testimony that during that phone call on  
21 February 1, 2012, it was decided that Lester would resign and  
22 you would replace him as president of Eber Brothers Wine &  
23 Liquor?

24 A. Yes. Originally it was supposed to be Mike and then it  
25 became me.



L9L2Kle4

W. Eber - Cross

1 Q. And so you acknowledge at this point, after having seen the  
2 e-mail I showed you at your deposition, that actually initially  
3 and for over a month, it was Mike Gumaer who was supposed to be  
4 the president after Lester, not you, correct?

5 A. Well, at that meeting then we decided it was going to be  
6 me.

7 Q. And that decision was not made until approximately March 12  
8 of 2012, correct?

9 A. No, we made the decision February 1, when we had the  
10 meeting.

11 Q. Let's just pull up Exhibit 103 and get this over with. All  
12 right. I want to go to -- I think it is the second page,  
13 please, Ali.

14 All right. So do you see if you look at this e-mail,  
15 March 2, at the bottom there, someone from Underberg & Kessler  
16 is e-mailing you saying, "Attached is a consent regarding  
17 Lester's resignation and the appointment of Mike Gumaer." So  
18 do you see that?

19 A. Yes.

20 Q. And do you remember how you responded to that e-mail?

21 A. No.

22 Q. Okay. Pull out -- you didn't say that Mike wasn't going to  
23 be the president, did you? You instead asked to put in his  
24 formal name. Correct?

25 A. This is what the e-mail says, but I --

L9L2K1e4

W. Eber - Cross

1 Q. Is it -- do you think this e-mail is incorrect?

2 A. I -- what I recall is that Lester resigned on February 1,  
3 and that's when we decided, instead of being Mike, it was going  
4 to be me. I'm not sure how the -- what this -- why this is --

5 Q. Let's just go to the first page, Ali, and zoom in on the  
6 last part there.

7 That shows on page 1 of Exhibit 103 that it was on  
8 March 12 that you asked the lawyers to substitute your name for  
9 Gumaer's as president, correct?

10 A. Well, that's what this says, March 12, yes. But it was, as  
11 I recall it, it was the 1st of February we had the call.

12 Q. You can take that down, Ali.

13 Now, it was on February 21 that your father, through  
14 Alexbay, filed a lawsuit against Eber Brothers seeking a  
15 judicial declaration that his proposal to take all the assets  
16 of Eber Wine & Liquor and Eber-Metro in satisfaction of his  
17 debt was commercially reasonable, correct?

18 A. He filed a -- for a judicial decision in Judge Rosenbaum's  
19 case, yes.

20 Q. So that was few weeks before the document we were just  
21 looking at, correct?

22 A. I believe so, yes.

23 Q. Let's talk about -- actually let me pull back.

24 The law firm Underberg & Kessler is a firm that has  
25 represented your companies and your father and you since 2010,

L9L2Kle4

W. Eber - Cross

1 correct?

2 A. I'm not sure exactly when they started representing us, but  
3 probably somewhere at that time.

4 Q. Let's just make clear Exhibit 144, page 2, and this is the  
5 interrogatory response asking for the dates when Underberg &  
6 Kessler -- it's number 16, Ali, all the way down. There you  
7 go. This is the dates and engagements for Underberg & Kessler,  
8 and do you see there that the first time that --

9 THE COURT: I can read that as well as she can.

10 MR. BROOK: Okay.

11 Q. So --

12 THE COURT: No disrespect, Ms. Eber.

13 Q. I just want -- so, Ms. Eber, does that refresh your  
14 recollection that the first time Underberg & Kessler was hired  
15 was actually to do estate planning for your father?

16 A. It says that here, yes.

17 Q. And isn't it correct that they did a bunch of other work  
18 and listed here before your father's will that we just saw was  
19 ultimately signed in 2013.

20 A. What's the question?

21 Q. So the will that was ultimately prepared that gives you all  
22 of Lester's business interest was ultimately signed in 2013,  
23 correct?

24 A. I'm not sure of the date it was signed.

25 Q. Okay. It's on the Exhibit 175. You can take that down,

L9L2Kle4

W. Eber - Cross

1 Ali.

2 Now, Underberg & Kessler represented Alexbay suing  
3 Eber Wine & Liquor, correct?

4 A. Yes.

5 Q. And it did so despite the fact that at the same time it was  
6 representing Eber Wine & Liquor in other matters, such as, the  
7 Harris Beach dispute, correct?

8 A. We hired independent -- Eber Brothers hired independent  
9 counsel during the -- when Judge Rosenbaum's decision was  
10 filed. Eber Brothers hired independent counsel.

11 Q. And this is Mr. Marino Fernandez you are referring to?

12 A. Yes.

13 Q. And he was somebody who was referred to you by Underberg &  
14 Kessler, correct?

15 A. Yes, he is a Rochester attorney, a small community --

16 Q. In your declaration you referred to him as an experienced  
17 corporate business lawyer from Rochester, as independent  
18 special counsel, correct?

19 A. I believe so, yes.

20 Q. And you also testified that he provided you with regular  
21 advice, is that right?

22 A. We did speak with him. Mike and I did speak with him, yes.

23 Q. And he participated in, for example, a board meeting on or  
24 about March 13 to discuss the Alexbay lawsuit.

25 A. He did and multiple phone calls. I was in person. I met

L9L2Kle4

W. Eber - Cross

1 with him in person at that meeting, but then there were  
2 multiple phone calls with him and Mike Gumaer.

3 Q. So is it fair to say that Mr. Fernandez did a lot of work  
4 to try to make sure that this transaction was fair to Eber  
5 Wine & Liquor.

6 A. He was involved in it, yes.

7 Q. And he was ultimately paid for his work by Eber Wine &  
8 Liquor, correct?

9 A. You know, part of his -- I don't know all the specifics of  
10 how he was paid. I think my father paid for part of it and I  
11 think maybe the company may have paid for part of his work. It  
12 is -- I don't really know all the specifics.

13 Q. So you think your father, who was suing Eber Brothers to  
14 take its assets, may have been paying the bills for your lawyer  
15 who was retained as independent special counsel? Is that  
16 right?

17 A. The company has no money. There is no money. Wine &  
18 Liquor has no money.

19 Q. Well, let's look at what Wine & Liquor paid. Exhibit 160  
20 at page 76, the second line from the bottom, and I apologize  
21 for the small font.

22 A VOICE: 76?

23 MR. BROOK: 76.

24 Q. So you see, second from the bottom, it says that Marino A.  
25 Fernandez, Jr., paid \$586.25 for his experienced corporate

L9L2Kle4

W. Eber - Cross

1 business counsel?

2 A. He was paid more than that.

3 Q. You have no record of any such payments, do you?

4 A. I don't, but my father paid more, paid, paid more than  
5 that. He required a retainer. Eber Brothers Wine & Liquor  
6 Corp. had no money. It was completely insolvent, along with  
7 Eber Wine & Liquor Metro, Inc. They had nothing.

8 Q. Isn't it true that Eber Wine & Liquor paid nearly \$2.5  
9 million in legal and accounting fees from the time period of  
10 August 2007 through May 2012?

11 A. I don't know exactly what -- I know there were a lot of  
12 legal fees paid.

13 Q. If the general ledger reflects legal and accounting  
14 expenses of \$2,480,000 and change from that time period, would  
15 you have any reason to doubt that that is an accurate  
16 reflection of how much in legal and accounting --

17 A. What was the time frame?

18 Q. The time frame of the entire time period covered by this  
19 general ledger, I believe it is August 2007 through May 2012,  
20 and we can look --

21 A. It could be even more. I mean, my father paid a tremendous  
22 amount of legal fees as well. There were lawsuits and  
23 liabilities and, you know, the legal fees are sickening.

24 Q. And they were paid by Eber Wine & Liquor, too?

25 A. Wine & Liquor paid legal fees and my father personally

L9L2Kle4

W. Eber - Cross

1 paid --

2 Q. And?

3 A. -- legal fees for the company.

4 Q. And in this case you submitted a demonstrative exhibit, I  
5 believe it is Exhibit KKKKK -- five Ks -- in which you -- don't  
6 put it up -- in which you identify, what is it, hundreds of  
7 thousands or millions of dollars in legal fees that you have  
8 compiled together by going through your father's checks to see  
9 how much he has paid different law firms, is that right?

10 A. Which exhibit? I know there are exhibits where I did go  
11 through his checks and where he did, you know -- it has the  
12 Bates number and the specific check where he did pay legal  
13 fees, among other liabilities that he paid for the companies,  
14 that he personally paid.

15 Q. And isn't it true that none of those checks that you have  
16 submitted either to this Court or in discovery show your father  
17 paying Marino Fernandez anything.

18 A. He did. I mean, he did. I don't know if we found all the  
19 checks or not, but he required a retainer and he definitely was  
20 paid.

21 Q. And you have not produced any retainer agreement in this  
22 case for Marino Fernandez, have you?

23 A. I don't -- I don't recall.

24 Q. So you don't recall seeing one or is this another  
25 unproduced document?

L9L2Kle4

W. Eber - Cross

1 A. I don't --

2 MR. SANTORO: Objection, your Honor.

3 THE COURT: What's the objection?

4 MR. SANTORO: The objection is that there are two  
5 options given there when there are a multiplicity of  
6 possibilities as to why that document isn't here right now.

7 THE COURT: Sustained as to form.

8 BY MR. BROOK:

9 Q. Do you remember ever seeing a retainer agreement for Marino  
10 Fernandez signed by anyone?

11 A. No, no, I don't.

12 Q. Did you search for one?

13 A. We searched for -- whatever the search terms were, we  
14 searched for them.

15 THE COURT: Counsel, did anybody seek discovery from  
16 this lawyer?

17 MR. BROOK: We could not find him, your Honor. The  
18 phone number leads to a Spanish language voice mail and there  
19 is no good mailing address for the lawyer, so we did endeavor  
20 to try to find this guy.

21 THE COURT: Is he a member of the bar of the State of  
22 New York?

23 MR. BROOK: He is. The address -- my associate who  
24 used to be with my firm was the one who was primarily tasked  
25 with that, and I remember not being able to find much of



L9L2Kle4

W. Eber - Cross

1 anything.

2 But I am actually done with this point, your Honor, I  
3 think. It is -- and just so we are clear, one of the reasons  
4 that we let that go is that the defense explicitly waived the  
5 advice-of-counsel defense in this case.

6 THE COURT: It might have been very interesting to see  
7 who paid him.

8 MR. BROOK: Well, we have \$586.25 in Eber Wine &  
9 Liquor's general ledger, your Honor.

10 THE COURT: But that comes from the client he  
11 allegedly was representing.

12 MR. BROOK: Right. It would certainly be interesting  
13 to see if the one who was on the other side paid him a lot of  
14 money, too, your Honor, I agree.

15 THE COURT: Okay. We will break for lunch. 2:00.

16 (Luncheon recess)

17  
18  
19  
20  
21  
22  
23  
24  
25

L9L2Kle4

W. Eber - Direct

## A F T E R N O O N S E S S I O N

2:05 p.m.

THE COURT: Okay. Let's continue.

Mr. Brook.

BY MR. BROOK:

Q. All right. Before we get into more of what happened back then, I would just like to briefly cover the current status of the company to see if there have been any changes in the ownership since the last time we have spoken.

Is it correct that at this moment, Eber-Metro still owns 79 units of Eber-Connecticut?

A. Yes.

Q. And you are going to have to speak up again.

A. I'm sorry, yes.

Q. And is Eber-Metro still 90.9 percent owned by Alexbay?

A. Yes.

Q. And you own 9.1 percent of Eber-Metro, correct?

A. Yes.

Q. And is Alexbay 100 percent owned by the Estate of Lester Eber?

A. Yes.

Q. And do you and Lester's estate together own 100 percent of Slocum of Maine?

A. Yes.

Q. Have any rights of first refusal, preemptive rights, or

L9L2Kle4

W. Eber - Direct

1 call options been granted on any of those companies over the  
2 last two years?

3 A. No.

4 Q. When we broke, we were talking a little bit about Marino  
5 Fernandez and the time period of March 2012, when the board  
6 approved the Alexbay trans-- or correct me if I am wrong, but  
7 on March 13, 2012, the board agreed that it would not fight the  
8 Alexbay lawsuit, is that correct?

9 A. Correct.

10 Q. That's a yes?

11 A. Yes.

12 Q. All right. And participating in that discussion were you,  
13 Mike Gumaer, Marino Fernandez, and Lester Eber, is that  
14 correct?

15 A. There were more than one conversations, but if you are  
16 referring to the -- there was one board meeting, but then there  
17 were many conversations after and before that where there were  
18 various people in those conversations. My father was not in  
19 all of those conversations.

20 Q. But your father was at the one official board meeting that  
21 you wrote minutes about, right?

22 A. That's what the minutes say, yes.

23 Q. And you were discussing the lawsuit that he had filed  
24 against the company, correct?

25 A. Correct.

L9L2Kle4

W. Eber - Direct

1 Q. And Marino Fernandez was providing you with legal advice  
2 with Lester there to listen to it, correct?

3 A. He -- yes, and -- but then I spoke with Mike thereafter  
4 many times, you know, thereafter, where Lester was not on the  
5 phone.

6 Q. Isn't it true that the day before that board meeting was  
7 the first time that Mike Gumaer ever learned about the Alexbay  
8 lawsuit?

9 A. He knew that Lester was foreclosing. I don't know if he  
10 knew the exact method, but he knew before that.

11 Q. Let's pull up Exhibit 122, and do you see this is an e-mail  
12 from Mike Gumaer to you on March 13, 2012, telling you "I am  
13 not in a position to discuss in any depth the Alexbay matter as  
14 I learned of the matter yesterday afternoon in the e-mail from  
15 Underberg"?

16 A. Yes.

17 Q. So does that refresh your recollection as to when he  
18 learned about the lawsuit?

19 A. Yes.

20 Q. And you see -- and this is also an e-mail that you recall  
21 you and I discussing during your deposition where we agreed  
22 that the second to last sentence included a typo, when he wrote  
23 "servive," and would you agree with me still that what  
24 Mr. Gumaer was saying is that on the surface it looks like  
25 Lester is moving against the trust of which he is a co-trustee?

L9L2Kle4

W. Eber - Direct

1 A. That's what it says.

2 THE COURT: I'm so relieved to have had that  
3 assistance. I could never, ever have figured it out.

4 Could we move it at a little greater speed than a  
5 glacier sliding uphill?

6 MR. BROOK: Yes, your Honor.

7 BY MR. BROOK:

8 Q. And but isn't it true that before that board meeting ever  
9 occurred, Marino Fernandez had already agreed to waive all  
10 defenses?

11 A. Well, I know that he -- I know that something was filed, I  
12 think, on the 9th or something, but Mike was well aware of what  
13 was going on. I don't know if -- this was --

14 THE COURT: Ms. Eber, I'm sorry to interrupt again,  
15 but this question is I don't think about Mike, unless there are  
16 two of them.

17 MR. BROOK: Yeah. I don't think so.

18 THE COURT: Let's pose the question to the witness  
19 again and please answer the question that you are asked.

20 BY MR. BROOK:

21 Q. Isn't it true that before the board meeting on March 13,  
22 Marino Fernandez had already waived all of Eber Brother Wine &  
23 Liquor's defenses to the Alexbay lawsuit?

24 A. I don't --

25 MR. BROOK: Let's put up Exhibit 124.

L9L2Kle4

W. Eber - Direct

1 THE COURT: Could we get the answer first?

2 MR. BROOK: I'm sorry. I thought she actually did.  
3 I'm having a hard time hearing her. I thought she did answer.

4 THE COURT: What's the answer to the question,  
5 Ms. Eber.

6 THE WITNESS: My understanding is that the lawsuit was  
7 just to figure out the commercially reasonableness.

8 THE COURT: Okay. We are going to go back again. You  
9 have forgotten the question again.

10 THE WITNESS: So I know that he signed something. I  
11 don't know -- I don't know if he had --

12 BY MR. BROOK:

13 Q. Yeah, so what I am showing you now is Exhibit 159. Let's  
14 just go to this.

15 A. Yeah, I'm --

16 Q. And do you see that this is the stipulation that was signed  
17 by Marino Fernandez on March 9, 2012?

18 A. Yes, yes.

19 Q. And it is correct that you do not have any e-mails or other  
20 documents showing that Mike Gumaer was ever apprised of this  
21 stipulation or even this lawsuit before the stipulation was  
22 filed?

23 A. Well, he knew about it. He knew -- I don't know if he knew  
24 about the specific lawsuit. He knew that Lester was moving  
25 forward on a foreclosure. I had multiple conversations with

L9L2Kle4

W. Eber - Direct

1 him and my father did as well.

2 Q. Okay. And isn't it correct that after the board meeting on  
3 March 13, 2012, Marino Fernandez had no further involvement in  
4 this Alexbay matter at all?

5 A. He -- no. There were multiple conversations with him.

6 Q. Isn't it true that at some point Underberg & Kessler began  
7 actually preparing Eber Wine & Liquor's own corporate documents  
8 to approve this transaction?

9 A. I believe they did, yes.

10 Q. Yes. So, for example, it was Underberg & Kessler who  
11 drafted the board authorization to approve this transaction in  
12 June 2012, correct?

13 A. I'm not sure.

14 Q. Exhibit 124, please. If you can zoom in on the second part  
15 there.

16 Do you see this is an e-mail from someone at  
17 Underberg & Kessler to you, Lester Eber, Glenn Sturm, David  
18 Belt, and a bunch of other people not named Marino Fernandez?

19 A. Okay, yes.

20 Q. It is attached -- subject is unanimous written consent of  
21 board of directors for Eber Brothers Wine & Liquor Corp.,  
22 correct?

23 A. Yes.

24 THE COURT: Just go back to that, please.

25 Ms. Eber, do you recognize the name Nelson Mullins

L9L2Kle4

W. Eber - Direct

1 that appears after Glenn Sturm's name in the little at symbol?

2 THE WITNESS: Yes.

3 THE COURT: What is it? Or was it at that time?

4 THE WITNESS: A law firm.

5 THE COURT: Was it a law firm that Mr. Sturm was  
6 connected to?

7 THE WITNESS: Yes.

8 THE COURT: Did that law firm ever do any work for  
9 your father, for you, or for any of the Eber companies?

10 THE WITNESS: Yes.

11 THE COURT: What kind of work?

12 THE WITNESS: He was a consultant and he did kind of  
13 general law work.

14 THE COURT: Was he a consultant on anything other than  
15 law work?

16 THE WITNESS: No, he helped with the company as well,  
17 as far as strategic.

18 MR. BROOK: I think she means, yes, your Honor, he was  
19 consultant beyond law.

20 THE WITNESS: Yes.

21 THE COURT: So what did he do beyond law?

22 THE WITNESS: He helped us -- well, he has a practice  
23 where he like strategically helped us with as far as the  
24 company had a lot of financial issues, and we were trying to  
25 strategically figure out a direction in terms of how to turn it



L9L2K1e4

W. Eber - Direct

1 around, and he helped us with that, as far as doing -- you  
2 know, coming in and doing consulting for us with the different  
3 members of the team and also helping us with some banking  
4 relationships as well.

5 THE COURT: So this is a guy that your companies paid  
6 legal fees, is that true?

7 THE WITNESS: We did pay some legal fees to him.

8 THE COURT: And you also paid business consulting  
9 fees, yes?

10 THE WITNESS: We may have paid some. I'm -- I don't  
11 know how much consulting fees we paid him.

12 THE COURT: Well, he wasn't doing all this consulting  
13 and legal work for nothing, right?

14 THE WITNESS: No, he was not.

15 THE COURT: And the people who were paying him was  
16 you, your father, and/or the Eber companies, yes?

17 THE WITNESS: Yes.

18 THE COURT: Okay. Let's go on, please. Thank you.

19 MR. BROOK: Okay.

20 BY MR. BROOK:

21 Q. And isn't it true, just to finish up the point, that other  
22 Nelson Mullins lawyers were also involved in 2010 at the time  
23 of Lester's line of credit note?

24 A. Yes.

25 Q. And those lawyers drafted the line of credit note and

L9L2Kle4

W. Eber - Direct

1 related security agreement and all of that?

2 A. I think Harris Beach was also involved in that.

3 Q. And is it correct that Nelson Mullins -- I'm sorry, that  
4 Glenn Sturm actually drafted the April 2010 letters that Lester  
5 sent to Sally Kleeberg and Audrey Hays?

6 A. I'm not certain. I believe Mike Gumaer may have helped on  
7 those, too.

8 THE COURT: And who is it that Mike Gumaer may have  
9 helped.

10 THE WITNESS: Lester on the letters.

11 THE COURT: Thank you.

12 BY MR. BROOK:

13 Q. All right. As the CFO of these different companies and  
14 having your finance background, you are familiar with the  
15 concept of good will in an acquisition, correct?

16 A. Yes.

17 Q. And so good will is the difference between a purchase price  
18 paid and the amount of the assets and the book value of the  
19 assets acquired, correct?

20 A. Yes.

21 Q. And do you recall that as of the beginning of 2011, that  
22 Eber-Metro had an asset of \$14 million of good will in  
23 Eber-Connecticut on its books?

24 A. It may -- I believe so, yes.

25 Q. And is it also correct that in or about early 2012,

L9L2Kle4

W. Eber - Direct

1 calendar year 2012, you had your accountants write off the good  
2 will on Eber-Metro's balance sheet?

3 A. I believe I approved it, yes.

4 Q. So the good will was erased, correct?

5 A. The company had lost like \$7 million, and many -- in over  
6 eight years, yeah.

7 Q. So that was a reason to erase another \$14 million asset  
8 from the books due to the losses? Is that what you are saying?

9 A. Well, I mean, was it fair? No.

10 Q. Well, at the same time, isn't it true that Eber-Metro on  
11 its books had a debt to Eber Brothers Wine & Liquor Corp. of  
12 over \$10 million?

13 A. I -- I don't -- I'm not certain of that.

14 Q. Does that sound about correct, though, to you? I don't  
15 want to have to go through all the documents.

16 A. I don't remember all the documents, so there may have been  
17 some intercompany things, yes.

18 Q. And is it correct that around the same time as the Alexbay  
19 transaction, you and/or your accountants erased any debts from  
20 Eber-Metro to Eber Wine & Liquor?

21 A. I don't remember the exact details. I mean, I wasn't  
22 involved in that, so I don't really recall, but there may have  
23 been.

24 Q. Well, who else besides you would have been involved in  
25 deciding whether or not to eliminate a debt between Eber-Metro

L9L2Kle4

W. Eber - Direct

1 and Eber Wine & Liquor?

2 A. Probably David Kaplan and the accountants, and Sumner  
3 Pearsall, our tax accountant. I'm not sure of all of the tax  
4 implications.

5 Q. But there were no other individuals besides you with  
6 operational control over the company who could have approved  
7 the elimination of a debt, correct?

8 A. At Connecticut, at the Connecticut level, our CFO, if it  
9 was Dave Dean, may have been involved as well. I don't --

10 Q. Just so we are clear, I'm talking about Eber-Metro and Eber  
11 Wine & Liquor. Do you understand that?

12 A. No, it would have just been me or Lester, yeah, but I don't  
13 recall the specific transaction.

14 Q. All right. Let's turn to the pension liability. Now, in  
15 your declaration, you emphasize that you thought that this was  
16 a very big problem for all of the Eber companies basically from  
17 2008 forward. Is that fair?

18 A. It was a big problem, yes.

19 Q. And so you always knew that it was going to have a big  
20 potential impact on Eber-Connecticut's business until it was  
21 paid or resolved, correct?

22 A. Yes.

23 Q. Isn't it true that you told Bob Lowenthal of Canandaigua  
24 National Bank that the pension liability would have no  
25 financial impact on the Eber-Connecticut business in February

L9L2Kle4

W. Eber - Direct

1 2010?

2 A. I may have put that in an e-mail, but . . .

3 Q. And if you put that into -- are you not sure? Do you want  
4 to look at the e-mail to be sure?

5 A. No, I would have tried to have been positive because I  
6 didn't want to lose the loan. Because if we lost the loan,  
7 then the company would go under, and we wouldn't be able to  
8 survive. So I was trying to be as positive as I could, knowing  
9 the severity of the situation.

10 Q. And isn't it also true that, in response to that question,  
11 in addition to saying it would have no financial impact, you  
12 asked Bob Lowenthal how he heard about the pension liability?

13 A. I don't recall.

14 MR. BROOK: Let's put it up 225.

15 A. I didn't -- I . . .

16 MR. BROOK: Very top.

17 Q. Just looking at the third sentence, you wrote to Bob  
18 Lowenthal, copying your father, "While we do not believe that  
19 it will have any impact, we discussed the issue internally and  
20 wondered how you heard about the matter. Please let us know."

21 Do you see that?

22 A. Yes.

23 Q. So is it fair to say that you yourself had not disclosed  
24 this pension issue to Canandaigua National Bank?

25 A. Well, they managed the pension, so they knew.

L9L2Kle4

W. Eber - Direct

1 Q. But they -- is it fair to say you had not disclosed to Bob  
2 Lowenthal that whatever the pension issue was might have any  
3 relation to its loan to Canandaigua National Bank, correct?

4 A. Can you repeat the question?

5 Q. Let me rephrase.

6 Isn't it true that Canandaigua's loan officer was  
7 under the belief that it was only Lester personally who was  
8 liable for the pension plan?

9 A. No.

10 MR. SANTORO: Objection, your Honor.

11 THE COURT: It's already been answered.

12 MR. BROOK: Okay. We will let the document speak for  
13 itself. You can take that down.

14 THE COURT: Look, I want to understand something,  
15 Ms. Eber.

16 THE WITNESS: Yes.

17 THE COURT: You testified a few minutes ago that you  
18 always knew that the pension liability was going to have a big  
19 potential impact on Eber-Connecticut's business until it was  
20 paid or resolved. Was that testimony truthful?

21 THE WITNESS: Yes.

22 THE COURT: Didn't you tell Mr. Lowenthal in 2010, in  
23 words or in substance, that you believed that the pension  
24 matter would not have any impact on Eber-Connecticut's  
25 business? Did you tell him that?

L9L2Kle4

W. Eber - Direct

1 THE WITNESS: In that e-mail I did.

2 THE COURT: Right.

3 THE WITNESS: Can I --

4 THE COURT: And what you wrote in that e-mail was not  
5 true, correct?

6 THE WITNESS: No, I -- can I correct myself? I  
7 think -- I always believed that it would have an impact on  
8 Metro, Eber-Metro. Connecticut, you know -- I believed it  
9 would impact all of the companies, yes. I believed that unless  
10 it was resolved, it would have an impact.

11 THE COURT: So the statement you made to Mr. Lowenthal  
12 at the time you made it was inaccurate and you knew it was  
13 inaccurate, right?

14 THE WITNESS: I -- no, I -- I just -- it was -- I was  
15 trying to paint a rosier picture than --

16 THE COURT: I understand that, and when one tries to  
17 paint a rosy picture, a rosier picture, to be precise, one is  
18 trying to paint a picture that looks rather different from what  
19 the picture would look like if it were not rose-colored, isn't  
20 that correct? Let me withdraw that because I think it is  
21 obvious.

22 You were trying to mislead him. True?

23 THE WITNESS: They managed the pension plan.

24 THE COURT: I didn't ask that. I know they were the  
25 trustee, one of three.

L9L2Kle4

W. Eber - Direct

1 THE WITNESS: Right.

2 THE COURT: I know that. You were trying to mislead  
3 Mr. Lowenthal, right?

4 THE WITNESS: I wasn't trying to mislead him. I -- I  
5 was hopeful that it wouldn't impact the company.

6 THE COURT: But you said that, your testimony,  
7 specifically your testimony, that you always knew it would have  
8 an impact was true, namely, that you always knew it would.  
9 That's what you said a few minutes ago.

10 THE WITNESS: Well, I always knew that we had to get  
11 it resolved with the pension plan, with the PBGC. I always  
12 knew that something had to be done to resolve these issues.

13 THE COURT: Go ahead, Mr. Brook.

14 BY MR. BROOK:

15 Q. So the e-mail we were just looking at was February 2010,  
16 correct?

17 A. Yes.

18 Q. And it was within about two months of that that you then  
19 had Glenn Sturm and/or Elliot Gumaer drafting letters to send  
20 to Sally Kleeberg and Audrey Hays asking for money to help  
21 Lester with his loans to the company, correct?

22 A. Sorry. Can you repeat the question?

23 Q. Sure. This was just a few weeks before the Lester Eber  
24 \$1.5 million line of credit was approved by the board,  
25 correct?



L9L2Kle4

W. Eber - Direct

1 A. Yes.

2 Q. And then that, in turn, was just a few weeks before six  
3 percent of Eber-Connecticut was sold from Eber-Metro to a  
4 company called Polebridge Bowman owned by Mr. Sturm, correct?

5 A. Sorry, can you repeat the question?

6 Q. Six percent of Eber-Metro --

7 A. Yes, we did.

8 Q. Sorry, sorry Eber-Metro sold six percent of  
9 Eber-Connecticut --

10 (Court reporter confers)

11 Q. Eber Connecticut was sold to Polebridge Bowman just a  
12 couple of months after the e-mail we were just looking at,  
13 correct?

14 A. When was the e-mail that we --

15 Q. I'm sorry. Let me rephrase. Just a few months. It was  
16 late May was when it was dated as of, correct? The Polebridge  
17 Bowman note.

18 A. Yes.

19 Q. The one where you got the right of first refusal, do you  
20 remember that?

21 A. Yes, yes.

22 Q. And do you acknowledge that that transaction was done for  
23 the purpose of trying to protect Eber-Connecticut from the  
24 pension liability?

25 A. It was done to try to help deconsolidate, yes, out of the

L9L2Kle4

W. Eber - Direct

1 control group, yes.

2 Q. Okay. So you previously testified that that transaction  
3 was done to compensate Glenn Sturm?

4 A. Well, it was both. There were two -- there were two things  
5 that -- it was to compensate him, to help turn around the  
6 company, so that we could then pay the pension plan and then  
7 also --

8 Q. And isn't it true that that six percent was originally  
9 intended to be paid or given to you rather than Mr. Sturm?

10 A. Yes.

11 Q. And that was -- so did you receive any additional, you  
12 know -- withdrawn.

13 And that six percent, when it was going to be  
14 transferred to you, that wasn't something that was ever  
15 discussed with the trustees at the trust besides Lester Eber,  
16 correct?

17 A. I believe it was discussed with Mike Gumaer.

18 Q. And that was after -- but wasn't the discussion with Mike  
19 Gumaer once it was a right of first refusal?

20 A. No, I think we -- Mike was involved in all of these  
21 conversations, so it's kind of hard for me to pick, you know,  
22 to remember all of the specific details, but he definitely  
23 spoke with Glenn and Lester and other attorneys as well.

24 Q. Isn't it true that Mike Gumaer expressed concerns about the  
25 fact that a right of first refusal going to you might be a

L9L2Kle4

W. Eber - Direct

1 problem, given the trust?

2 A. Yeah, there is an e-mail on that, yes.

3 Q. And isn't it true that you assuaged Mr. Gumaer's concerns  
4 by telling him that it was Eder-Goodman that wanted you to have  
5 the right of first refusal rather than giving a right of first  
6 refusal to Eber-Metro?

7 A. Originally it was supposed to go, I think, to me and then  
8 it -- based on discussions, Lester decided that it would go to  
9 Glenn, and that would be for his compensation. And as a result  
10 of that, then I got the right of first refusal as far as  
11 compensation that was -- I mean, that was part of  
12 compensation --

13 Q. My question was about --

14 A. Sorry.

15 Q. -- whether you told Mike Gumaer that Eder-Goodman wanted  
16 you to get the right of first refusal. Isn't that what you  
17 told Mike Gumaer?

18 A. I don't -- I don't remember telling him that. I may have  
19 said that in -- you know, it's -- there is a lot of, like, time  
20 that's gone through. I may have testified to that in my  
21 deposition, but I don't quite remember.

22 MR. BROOK: Your Honor --

23 A. But they did approve it. They did approve it.

24 MR. BROOK: Your Honor, at this time I would like to  
25 play some deposition video. I understand that -- this is from

L9L2Kle4

W. Eber - Direct

1 pages 316/line 7 to 317/15.

2 Q. Your individual deposition.

3 MR. BROOK: Hopefully sound works.

4 PARALEGAL: Hopefully. No, not going through the  
5 sound, through the system. I don't know why.

6 THE COURT: Read it.

7 MR. BROOK: Yeah, getting to it now.

8 PARALEGAL: Is it ready now? No, it's muted on the  
9 system. How do I unmute?

10 MR. BROOK: I'm just going to read it. So I will read  
11 the deposition. Are you able to put it up?

12 PARALEGAL: Let me see if I can get it this time. No,  
13 it's not working. I'm sorry. I can put it up on the screen.

14 MR. BROOK: I think that would be good, if you can get  
15 to it, so everyone can make sure I am reading it right.

16 A VOICE: What page are you on?

17 MR. BROOK: 316.

18 THE COURT: Please just read it.

19 MR. BROOK: Okay. Line 7.

20 "Q What do you recall about your discussions with Mike and  
21 his concerns?

22 "A Well, we discussed that these issues, I did send it to Pat  
23 Dalton. As I recall, the six percent, the right of first  
24 refusal, we had to have that six percent approved by the  
25 partner, and so that's something that they had wanted and then

L9L2Kle4

W. Eber - Direct

1 we discussed it with the attorneys, and then this is what they  
2 came up with. You know, they came out with -- the attorneys  
3 came out with what was acceptable to everyone, because there is  
4 a couple of groups involved here, and then that was signed off  
5 by Mike, and so we did talk about it.

6 "Q What did you say to Mike in response to his questions  
7 about whether it would be possible to have Eber-Metro have the  
8 right of first refusal?

9 "A I think Eber-Metro does have -- I'm not looking at the  
10 document right now, but I do think it does" have it -- "does  
11 has like after me."

12 "Q After you, but not the first right of first refusal?

13 "A Right, but I think this is what the partner wanted and  
14 this is what was agreed to, so this is what the lawyers --

15 "Q What do you mean by the partner? Who are you referring  
16 to?

17 "A Eder-Goodman.

18 "Q So Eder-Goodman, you are saying, wanted you to have the  
19 first right of first refusal?

20 "A I think that's what was decided. That was what was  
21 decided. That was what the lawyers prepared, and then Mike  
22 signed off on it, so he was okay with it."

23 And that was your testimony at the deposition,  
24 Ms. Eber, correct?

25 A. I have since looked and reviewed this, and if it had gone

L9L2Kle4

W. Eber - Direct

1 back to Metro --

2 Q. I don't actually have a question pending for you right  
3 now.

4 Now, let's just wrap up a little bit with Polebridge  
5 Bowman. So is it correct in 2015 Polebridge Bowman's payment  
6 in the form of a \$350,000 nonrecourse note was going to come  
7 due?

8 A. Yes.

9 Q. And you extended it by one year, correct?

10 A. Correct.

11 Q. And then in 2016, when the note was going to come due  
12 again, you extended it this time by ten years, correct?

13 A. Yes.

14 Q. Then in February of 2017, you actually assumed the  
15 Polebridge Bowman note and, with it, their six percent interest  
16 in Eber-Connecticut, correct?

17 A. He sold it to me.

18 Q. He sold it to you for nothing but the assumption of the  
19 debt, correct?

20 A. I assumed the debt, correct. He was in very bad health,  
21 yes.

22 Q. And so at the time that you assumed the debt of roughly  
23 \$350,000, isn't it true that you already knew that you were  
24 expecting a \$150,000 dividend payment from Eber-Connecticut?

25 A. No.

L9L2Kle4

W. Eber - Direct

1 Q. So that wasn't something that was decided at the same time  
2 as the Polebridge Bowman transfer?

3 A. Well, he had -- I didn't get the payment. It was -- he had  
4 wanted to get out of -- he was in declining health, and he  
5 wanted to get out of it, so he sold it to me, and then I --  
6 when the distribution -- they were figuring out the  
7 distribution of how much the distribution should be, I  
8 designated my portion to pay the pension, the legal -- the  
9 legal fees, the closing costs, and other -- you know, the vast  
10 majority of it, I think it was 100 and -- what did you say? --  
11 50 thousand dollars?

12 Q. \$25,000 per unit that was paid, right?

13 A. Right, and then that went to pay the PBGC and the legal  
14 closing costs and other Metro costs, expenses of Metro, like  
15 legal fees. I did get a small amount, like maybe 10 percent,  
16 maybe it was a little more. I can't remember exactly.

17 Q. If we look at Eber-Connecticut's records, we will see a  
18 \$150,000 payment to you, though, in the first instance,  
19 correct?

20 A. No, no. It went to Metro and directly to State Street Bank  
21 to pay down the pension. When we settled with the PBGC for \$2  
22 million, Metro and my portion --

23 Q. All right.

24 A. -- directed Connecticut to pay State Street Bank to pay the  
25 PBGC, and then the vast majority of the rest of it went to pay

L9L2Kle4

W. Eber - Direct

1 closing costs to the bank and other expenses of Metro, and then  
2 I did get a small portion.

3 Q. And as of today, you still owe approximately \$350,000 to  
4 Eber-Metro under the note, is that right?

5 A. I don't know. I've got to look. I don't remember exactly.

6 THE COURT: Whether you do or you don't, it's  
7 nonrecourse, right?

8 THE WITNESS: Correct. That may have --

9 MR. BROOK: So --

10 THE COURT: Yeah.

11 MR. BROOK: -- I was about to offer to pay \$350,000  
12 for it, but that would not be appropriate.

13 BY MR. BROOK:

14 Q. All right. Let's go back.

15 So we talked about how -- the things you said to  
16 Canandaigua National Bank, and it is fair to say you tried to  
17 paint a rosier picture for PBGC's people, too, in 2011, 2012,  
18 or so, correct?

19 A. We were doing the best we could. I was trying to do the  
20 best we could to pay them.

21 Q. Now, is it correct that, by the end of October 2011, you  
22 were telling PBGC's representative that the company,  
23 Eber-Connecticut, does not have any intention of seeking to  
24 terminate the pension plan, much less terminate the plan within  
25 five years of March 2007?



L9L2Kle4

W. Eber - Direct

1 A. Sorry, could you repeat that.

2 Q. I will step back.

3 Is it not your testimony in your declaration that you  
4 believe that the pension plan was terminated in April 2010?

5 A. It was terminated -- it was retroactively terminated to  
6 2010, yes.

7 Q. But you fought against that ruling for many, many years,  
8 correct?

9 A. We -- we negotiated with the PBGC for many years. I mean,  
10 the termination liability was 5.1 plus million, which then  
11 there was a termination letter for like \$7.9 million, so it was  
12 a long negotiation for many years back and forth.

13 MR. BROOK: Move to strike the termination liability  
14 amount in actuarial expert testimony.

15 A. Well, it was in the --

16 THE COURT: It's stricken. The question is whether  
17 you fought against the ruling for many years.

18 THE WITNESS: We negotiated for many years, yes.

19 BY MR. BROOK:

20 Q. And you paid, you and your father paid a lot of money to  
21 lawyers to fight against having a termination date before June  
22 5, 2012, correct?

23 A. We paid lawyers to defend us, yes --

24 Q. And --

25 A. -- and to negotiate.

L9L2Kle4

W. Eber - Direct

1 Q. Is it now your testimony that you always believed that that  
2 was a losing battle, and that Eber-Connecticut and Eber-Metro  
3 would always be on the hook for the pension?

4 A. Eber-Metro, yes. Well, I mean, yes, that there was a  
5 liability out there, and it had to be negotiated and it had to  
6 be a negotiated settlement.

7 (Continued on next page)

L9LsKLE5

Cross - W. Eber

1 BY MR. BROOK:

2 Q. So you would agree then that spending hundreds of thousands  
3 of dollars on lawyers was just a waste of money?

4 A. No.

5 Q. You're trying to get this court to give your father credit  
6 towards his estate for spending hundreds of thousands of  
7 dollars fighting PBGC when you always knew it was a lost cause,  
8 isn't that your testimony?

9 MR. SANTORO: Objection, your Honor. Mischaracterizes  
10 her testimony.

11 THE COURT: Answer the question, please.

12 A. Can you repeat the question?

13 Q. It's harder than it looks.

14 Isn't it true that --

15 Let me take that back. So is it now your testimony --

16 MR. BROOK: Gosh, I've completely lost it, your Honor.  
17 Would it be possible to ask the court reporter to read that  
18 back?

19 THE COURT: Yes.

20 (Record read)

21 A. No, I -- no, we were trying to negotiate with them, and if  
22 they had imposed the 5.1 million or whatever, it just would  
23 have -- we wouldn't have been able to survive. It would have  
24 simply crushed the company.

25 Q. Let's talk about something else just to try to get through

L9LsKLE5

Cross - W. Eber

1 this.

2 You created a company called Segway LLC, correct?

3 A. Yes.

4 Q. And in 2013, you transferred numerous accounts receivable  
5 of Eber Wine & Liquor to Segway, correct?

6 A. I'm not sure of the exact date. There were -- there were a  
7 couple of them, yeah.

8 Q. OK. Is it fair to say that you've collected nearly  
9 \$200,000, by now more than \$200,000 in money from those  
10 accounts?

11 A. No, no, no.

12 Q. All right. Let me ask you this. Have you collected over  
13 \$123,000?

14 A. I think it was approximately 123, yes.

15 Q. And then as of a few years ago, you were projecting to  
16 potentially collect as much as 70,000 more?

17 A. We never got it.

18 Q. So that was money that you received after 2013, even though  
19 Eber Wine & Liquor, you're saying, was already shut down for  
20 six years, is that right?

21 A. Those --

22 Should I explain this?

23 Those were receivables that were assigned to the  
24 Teamsters. OK. Because we had a, you know, \$2.2 million  
25 liability with Teamsters.

L9LsKLE5

Cross - W. Eber

1 Q. Ms. Eber, I'm just asking if you did not use Eber Wine &  
2 Liquor assets to collect \$120,000, even though it was more than  
3 six years after you said the business shut down?

4 A. I paid \$150,000 to settle a case -- I mean, to settle with  
5 the Teamsters towards settling the Teamsters --

6 THE COURT: Ms. Eber, we are getting no place fast  
7 here --

8 THE WITNESS: OK. Sorry.

9 THE COURT: -- because you just have talking points,  
10 and it doesn't matter what question gets asked, you give us  
11 your little speeches.

12 THE WITNESS: OK.

13 THE COURT: And you're not helping anybody.

14 THE WITNESS: I'm very sorry.

15 THE COURT: Least of all yourself.

16 THE WITNESS: What's the question? I'm sorry.

17 MR. BROOK: At this point, your Honor, I would  
18 actually just like to move on to another topic.

19 THE COURT: Pardon me?

20 MR. BROOK: At this point, I'm just going to move on  
21 to another topic. I'm trying to get through this fast.

22 BY MR. BROOK:

23 Q. Let's talk about Harris Beach. That was the law firm that  
24 was involved in a lot of these transactions, including the  
25 Polebridge transaction, correct?

L9LsKLE5

Cross - W. Eber

1 A. Correct.

2 Q. They sued Eber Wine & Liquor for not paying their bills,  
3 correct?

4 A. Correct.

5 Q. And then you counter-sued alleging they committed  
6 malpractice by, among other things, failing to submit the  
7 litigation claim to insurance, correct?

8 A. Can you repeat the question?

9 Q. Did you not have a counterclaim against Harris Beach?

10 A. I believe so.

11 Q. And isn't it also true that you had defenses against their  
12 claims, such as claiming that they over billed?

13 A. I don't recall those counter defenses.

14 Q. All right. Well, I believe --

15 A. I know they did not submit the claim, though.

16 Q. OK. I believe relevant documents are in evidence, and I  
17 will not take time to read through those now, but I will ask  
18 you this.

19 So the Harris Beach lawsuit was ultimately -- it ended  
20 up becoming a fraudulent conveyance lawsuit filed afterwards,  
21 correct; they accused you of having fraudulently transferred  
22 Eber-Connecticut assets away from Eber Wine & Liquor to  
23 Alexbay?

24 A. Yes.

25 Q. That was ultimately discovered by PBGC, correct, the

L9LsKLE5

Cross - W. Eber

1 lawsuit, fraudulent conveyance lawsuit was discovered by PBGC,  
2 correct?

3 A. I believe so. I'm not sure.

4 Q. PBGC sued Eber Wine & Liquor to try to change the pension  
5 plan termination date, correct?

6 A. No, I don't believe that that's how that worked. I'm not  
7 certain, but that's what happened.

8 Q. You were the one who was directing and supervising Eber  
9 Wine & Liquor's response to the PBGC lawsuit about the planned  
10 termination date, weren't you?

11 A. I'm sorry?

12 Q. Were you not the person at Eber Wine & Liquor who was  
13 directing the litigation against PBGC in 2015, 2016?

14 A. Yes, I was.

15 Q. OK. Is it fair to say that during that litigation, PBGC's  
16 lawyers relied heavily on the filings that have been made by  
17 Harris Beach in their fraudulent conveyance lawsuit?

18 MR. SANTORO: Objection, your Honor.

19 THE COURT: Sustained.

20 Q. In the PBGC litigation, didn't your lawyers not -- let me  
21 withdraw that.

22 So the Harris Beach lawsuit litigation, that was  
23 ultimately settled where your father paid \$400,000 to Harris  
24 Beach, correct?

25 A. Yes.

L9LsKLE5

Cross - W. Eber

1 Q. And as part of that settlement, Eber Wine & Liquor  
2 dismissed their counterclaim for malpractice, correct?

3 A. I'm not certain.

4 Q. Isn't it correct that Eber Wine & Liquor gave a full  
5 release to Harris Beach as part of that settlement?

6 A. I'm not -- I'm not sure.

7 THE COURT: It's a matter of record?

8 MR. BROOK: It is, but I promise I'm trying to go  
9 somewhere and failing.

10 Q. So it's correct, though, that Harris Beach's claims against  
11 Eber Wine & Liquor were not dismissed, they were instead bought  
12 by your father?

13 A. Yes, that's what they -- that's what they required.

14 Q. Who's they?

15 A. Harris Beach.

16 Q. So you're saying that Harris Beach, who is conveniently not  
17 around, is the one that said that they would not dismiss their  
18 claims and instead they insisted that your father buy their  
19 claims against the company of which he was president, is that  
20 right?

21 MR. SANTORO: Objection, your Honor. That question  
22 was just answered.

23 THE COURT: No, I don't think so.

24 Overruled. Answer the question, please.

25 A. Yes, I believe so.



L9LsKLE5

Cross - W. Eber

1 Q. And, again, I don't suppose you have anything in writing  
2 that would support that testimony, correct?

3 A. No. I don't know. I don't know.

4 Q. And do you consider the amount of \$400,000 that he paid to  
5 be nothing but a nuisance to your father, given his wealth?

6 MR. SANTORO: Objection, your Honor.

7 THE COURT: Sustained.

8 Q. Isn't it true that your lawyers in the PBGC case told a  
9 federal judge that the Harris Beach litigation was settled for  
10 nuisance value and that the claims were dismissed with  
11 prejudice on the merits?

12 A. I don't know.

13 Q. If a statement like that was made, that would be untrue,  
14 correct?

15 A. I don't understand.

16 MR. SANTORO: Objection, your Honor.

17 THE COURT: Overruled.

18 A. Could you repeat it? I don't understand what you're  
19 saying.

20 Q. Sure. Why don't we put it up on the screen so we can see  
21 what your lawyers wrote. It is Exhibit 166 at page 11 of the  
22 PDF. It's before the bullet points. That's good.

23 MR. SANTORO: 166?

24 MR. BROOK: Yes, 166. This is the reply brief filed  
25 by Eber Wine & Liquor's lawyers under Wendy Eber's supervision

L9LsKLE5

Cross - W. Eber

1 in the PBGC litigation.

2 A. Sorry. Can you repeat --

3 Q. Do you see that your lawyer or lawyers represented to the  
4 judge in the Western District of New York that the Harris Beach  
5 litigation had settled for nuisance value and that the claims  
6 were dismissed with prejudice on the merits?

7 A. Does it say the lawyer who made the claims has recently  
8 admitted what?

9 Can you --

10 Q. You want to focus on the affidavit that your lawyer signed  
11 as part of the settlement, is that right?

12 I'm asking about the sentence before that, Ms. Eber.

13 A. So what are you exactly -- that the litigation recently  
14 settled --

15 Q. Do you see that statement that's highlighted there that I  
16 just read? Are you with me?

17 A. Yes.

18 Q. And that statement, based on your testimony about Harris  
19 Beach insisting that Lester buy the claims, was not true  
20 because their claims were not dismissed with prejudice on the  
21 merits?

22 A. I -- I'm sorry. It is legal terms I don't understand. I  
23 don't understand this. What I'm simply saying is that Harris  
24 Beach did require him to settle that way, and that's what my  
25 understanding is.

L9LsKLE5

Cross - W. Eber

1 Q. Do you know what the term nuisance value means or is that  
2 too legalese for you?

3 A. It was 400,000 that he settled for.

4 Q. And isn't it true that after Lester made that \$400,000  
5 payment, you later became the executor of Lester's estate and  
6 sought to collect on that claim from Eber Wine & Liquor?

7 A. I believe there was a letter written outlining his claim,  
8 yes.

9 Q. And you demanded that -- and you're talking about a letter  
10 that you wrote to yourself, right?

11 A. To the estate in the surrogate's court, there was a  
12 proceeding that the plaintiffs brought there, and so this was  
13 part of that, that letter, yes.

14 Q. This is a letter, if you recall -- and I can put it up if  
15 you need your recollection refreshed -- that you wrote as  
16 executor of Lester's estate to Eber Wine & Liquor's board,  
17 which was you and you alone, correct?

18 A. Yes, there was a letter, but this -- this was what Harris  
19 Beach --

20 Q. I only need the yes.

21 Isn't it correct that in that letter, you made a  
22 demand of over \$1.7 million from Eber Wine & Liquor because  
23 Lester paid \$400,000 to Harris Beach to buy Harris Beach's  
24 claim?

25 A. I don't recall the exact amount. I mean, I'm not ...

L9LsKLE5

Cross - W. Eber

1 Q. Let's put Exhibit 400 up, second page, and refresh your  
2 recollection. Item three.

3 Further.

4 Do you see that last line there, the estate intends to  
5 demand immediate payment of the HB receivable in full, plus  
6 accrued interest therein, which amounts to \$1,784,566 as of May  
7 last year?

8 A. It was the interest on it. I thought it was on the 400,000  
9 and the interest on it.

10 Q. Well, let's look at the last sentence of the first  
11 paragraph.

12 A. I know there is an attachment too to it that would have the  
13 detail on it.

14 Q. We don't need to go into the detail. We're not offering  
15 this into evidence.

16 Are you standing by that demand, do you think that  
17 Lester deserves to get paid the full amount that Harris Beach  
18 claimed plus interest at 9 to 15 percent?

19 A. It was the 400,000 plus the interest, yes.

20 Q. You think that 400,000 plus interest can be \$1.7 million  
21 and you're the CFO of a company?

22 A. I'm sorry. I'm confused.

23 Q. Clearly.

24 Let's go on to another topic.

25 THE COURT: Just so I'm sure I understand, is it your

L9LsKLE5

Cross - W. Eber

1 position, Mr. Brook, that this was a way of an attempt to milk  
2 assets out of the trust?

3 MR. BROOK: Yes, your Honor. In particular, it was a  
4 way to ensure that if and when my clients ever learned about  
5 what was happening, that Lester Eber would be able to have a  
6 priority over any shareholders of Eber Wine & Liquor by having  
7 so much debt interest in Eber Wine & Liquor, no money could  
8 ever get to them.

9 In fact, we are seeing these arguments here in this  
10 case with the pension and everything else.

11 THE COURT: Thank you.

12 BY MR. BROOK:

13 Q. All right. Now, shortly after this lawsuit was filed in  
14 February 2017, the same time when you acquired the Polebridge  
15 Bowman 6 percent, you also issued 750 preferred voting shares  
16 to Lester. We talked about that earlier, correct?

17 A. Correct.

18 Q. And as part of that transaction, there were a number of  
19 different documents that you and Lester both signed, correct?

20 A. I don't recall all the documents.

21 Q. Well, let's take a look at the ones that you produced in  
22 discovery before your deposition.

23 Plaintiffs' Exhibit 43. I can give you a hard copy if  
24 you need to see it.

25 Does it refresh your recollection that there were a

L9LsKLE5

Cross - W. Eber

1 number of different consents signed in relation to amending the  
2 certificate of incorporation and issuing your father preferred  
3 shares?

4 You can scroll through the pages, Ali. Perhaps that  
5 might help. Just want to make sure we're on the same page that  
6 this happened.

7 A. Yes, it -- it -- yes, it did happen. He --

8 Q. OK.

9 A. There was --

10 Q. Again, you signed a number of documents, including at the  
11 end -- if you can go to the last page, Ali -- you've got the  
12 written consent of the stockholders of Eber Wine & Liquor  
13 Corporation, that was something that Lester signed for himself  
14 appointing you as a director, correct?

15 A. Yes. Yes, I know that --

16 Q. OK. Yes is all I need.

17 MR. BROOK: If you could, Ali, just real quick zoom in  
18 on the Bates number there at the bottom there to make sure we  
19 see it.

20 All right. We're in the early stages of the  
21 production. 1173 is the Bates number.

22 Q. Then after your first day of your deposition, I deposed you  
23 again, and you had produced another written consent form,  
24 Exhibit 115, this is one purportedly signed by you as of  
25 February 14, 2017.

L9LsKLE5

Cross - W. Eber

1 Do you remember discussing that with me?

2 A. No.

3 Q. Isn't it true that you testified that you don't know why  
4 this document wasn't with the other ones?

5 A. I don't remember. I mean, I don't recall all the details  
6 of every document.

7 Q. Do you recall that -- you can take that down.

8 Then after discovery was closed, the plaintiffs filed  
9 a motion for summary judgment claiming there was one document  
10 missing, a shareholder consent form to amending the certificate  
11 of incorporation of Eber Brothers Wine & Liquor, which had to  
12 be signed by Eber Brothers & Co.

13 Does that ring any bells?

14 A. I don't remember specifically.

15 Q. Do you remember finding another document much later in  
16 2019?

17 A. There are so many documents in this case, I don't remember  
18 all the documents.

19 Q. OK. Let's pull up Exhibit 270. This is a letter to me  
20 dated December 6, 2019, from Paul Keneally. This was your lead  
21 counsel before the Farrell Fritz firm became involved, right?

22 A. Yes.

23 Q. And he was also a lawyer who was involved in representing  
24 Eber Wine & Liquor all the way back in 2012, correct?

25 A. Under --

L9LsKLE5

Cross - W. Eber

1 THE COURT: Get on with it.

2 MR. BROOK: Sorry.

3 Q. So do you see on the next page that shareholder consent  
4 that the plaintiffs had argued was necessary for the  
5 transaction to be corporately valid?

6 A. I'm not really familiar with all these documents, so I --

7 Q. All right. So would I be correct in assuming that you  
8 cannot tell me today where you found this document after the  
9 summary judgment motions were filed?

10 A. I don't remember all the details on all these documents.  
11 There is a lot of documents here.

12 Q. And isn't it true that the plaintiffs requested that you  
13 find some contemporaneous e-mails or the Word document that  
14 produced it to try to show that this document was not something  
15 that was a forgery backdated by more than two years?

16 A. No.

17 What's the question?

18 Q. So you never -- you referred earlier to the plaintiffs'  
19 request and how you tried to respond to those requests,  
20 correct?

21 A. Yes, I -- I --

22 Q. So you were aware of the fact that plaintiffs, after seeing  
23 this mysterious find, requested that you and your lawyers go  
24 back and find some e-mails showing when it was actually sent or  
25 signed or drafted?



L9LsKLE5

Cross - W. Eber

1 MR. SANTORO: I would just object, your Honor, to the  
2 characterizations and him asking her to acknowledge things like  
3 mysterious and so forth.

4 THE COURT: Overruled.

5 A. I don't -- I don't remember all the details on every single  
6 document. There is a lot of documents here. They are in  
7 different places and, you know, I --

8 Q. You did remember during your deposition that this document  
9 and the other transaction documents were prepared by  
10 Mr. Herbert for you, even though he's your personal lawyer and  
11 not the company's lawyer, is that right?

12 MR. SANTORO: Objection, your Honor. There is three  
13 or four questions in there. I don't know which one he is  
14 asking her to acknowledge to.

15 THE COURT: Overruled.

16 Q. Mr. Herbert, you have long insisted, is only yours and  
17 Lester's personal lawyer, not the company's lawyer, correct?

18 A. Yes.

19 Q. Yet you also testified Mr. Herbert is the one who drafted  
20 the various February 14 and 15, 2017, documents to allow Lester  
21 to take a new class of voting preferred shares in Eber Wine &  
22 Liquor, correct?

23 A. I believe so, yes.

24 Q. How does Mr. Herbert his documents to you when he wants you  
25 to sign them?

L9LsKLE5

Cross - W. Eber

1 A. He -- you know, sometimes he e-mails them. Sometimes he's  
2 given me documents. I don't know.

3 Q. Doesn't he live in California?

4 A. Now he does.

5 Q. In 2017, he didn't?

6 A. I don't think so. I think -- I'm not sure when he moved  
7 out there. It was recently he moved out there.

8 Q. He's never sent you documents by means like Pony Express or  
9 something like that, is that right?

10 A. Not that I recall.

11 Q. OK. Let's look at Exhibit 271 to see what your lawyer said  
12 about this. Page eight.

13 It says here, paragraph one, Mr. Herbert has as yet  
14 been unable to locate the Word version of the shareholder  
15 consent, or any e-mail transmitting it to Ms. Eber in 2017, but  
16 will continue to look for them. If they are found, we will  
17 provide them to you. The shareholder consent form may have  
18 been copied over, and the document may have been given to  
19 Ms. Eber other than by e-mail.

20 All right. You can take that down.

21 We'll go to the last topic.

22 THE COURT: Last what?

23 MR. BROOK: Last topic. Actually, maybe on the same  
24 exact page, if we need to go to it, Ali.

25 BY MR. BROOK:

L9LsKLE5

Cross - W. Eber

1 Q. When this lawsuit got started and well into discovery, you  
2 acknowledge that Eber Wine & Liquor actually had two different  
3 shareholders, correct; there was both Eber Brothers & Co. and  
4 also the Allen Eber trust had some non-voting shares, is that  
5 right?

6 A. I'm not really certain. I know there is a corporate chart.  
7 If you have the chart, it's kind of ...

8 MR. BROOK: Sure. Let's look at the chart that you  
9 produced in discovery before summary judgment.

10 Plaintiffs' Exhibit 147. It looks like it is at the  
11 last page.

12 If you can, zoom in on the bottom half of that,  
13 please, Ali, below just everything below the Eber Brothers &  
14 Co. Inc. dormant.

15 MS. KRAL: Right here?

16 MR. BROOK: There.

17 BY MR. BROOK:

18 Q. All right. So actually, if we don't count Lester's voting  
19 preferred shares issued in 2017, this shows that Eber Brothers  
20 & Co. Inc., had 72.7 -- let me withdraw that.

21 These numbers are actually now confusing me. You  
22 don't actually put a percentage on this on the right.

23 This chart on the right shows, without a percentage,  
24 that there are shares that were held in the name of the Allen  
25 Eber trust, correct?

L9LsKLE5

Cross - W. Eber

1 A. Correct.

2 Q. And that was 200 non-voting preferred and 379 non-voting  
3 common, correct?

4 A. Correct.

5 Q. And since the end of discovery, you have decided to write  
6 those shares off the books of the company, correct?

7 A. No. We -- they never came up on the -- we thought that  
8 they got retired. This was something that was kind of handed  
9 to me, and I didn't -- we couldn't find these shares. And then  
10 when we went to the Canandaigua accounting for the trust, they  
11 weren't there either. So it was kind of one -- it was  
12 confusing because we thought that they had been retired.

13 Q. But you saw no corporate documents saying these shares had  
14 been redeemed or retired, correct?

15 A. There was, like, a stock power or something, either  
16 something there that --

17 Q. Well, you did have a stock certificate in your files,  
18 Plaintiffs' Exhibit 139.

19 MR. BROOK: Put it up.

20 MS. KRAL: I don't have it.

21 MR. BROOK: You don't have it?

22 MS. KRAL: Hold on. I'll get it.

23 MR. BROOK: May I approach, your Honor, the witness?

24 It's on the exhibit list, I'm sure.

25 MR. MULRY: We just don't have a copy.

L9LsKLE5

Cross - W. Eber

1 BY MR. BROOK:

2 Q. Well, you recognize that as a copy of the certificate  
3 issued to the trust that was produced by you and your companies  
4 in this litigation, correct?

5 THE COURT: That's not what's on the screen, is it?

6 MR. BROOK: No. I'm sorry, your Honor, for some  
7 reason the electronic version of this is not available at the  
8 moment. I have an extra hard copy, if your Honor would like.

9 THE COURT: That would be a good idea if you would  
10 like me to look at it.

11 MR. BROOK: It's right here.

12 MR. SANTORO: If you wouldn't mind, could I take a  
13 quick peak before you hand it up? Thank you.

14 (Counsel confer)

15 MS. KRAL: Your Honor, may I approach?

16 Thank you.

17 BY MR. BROOK:

18 Q. This is something that was produced from your company's  
19 files, correct?

20 A. Apparently it was, yes.

21 Q. And nothing on this says that the stock has been canceled  
22 or redeemed or anything like that, correct?

23 A. Nothing on this piece of paper does, but I thought there  
24 was some kind of stock power. It never showed up on  
25 Canandaigua's bank -- on their statement of the trust of Allen

L9LsKLE5

Cross - W. Eber

1 Eber when that estate was settled.

2 Q. So is it your belief that if Canandaigua misplaced the  
3 stock certificates, that gives you cause to just erase the  
4 stock from the company's books?

5 A. I don't agree with that statement. I don't know if -- I  
6 don't know if they existed.

7 Q. You don't know what happened to them period, right?

8 A. Yeah, we couldn't figure --

9 Q. But you just erased them anyway?

10 A. No. I wasn't certain of what was the situation. I didn't  
11 know. I don't know.

12 Q. Isn't it true that when the previous bank trustee, M&T  
13 Bank, provided its accounting, it did include these shares of  
14 Eber Wine & Liquor stock held by the trust on its account?

15 A. Right. And then I think in 2006, they may have been  
16 retired, is what my understanding was.

17 THE COURT: Where did you get this understanding?

18 THE WITNESS: I believe I spoke with the lawyer and we  
19 couldn't -- when it came to M&T's, or Canandaigua, they didn't  
20 have it.

21 THE COURT: What lawyer did you speak to about this?

22 THE WITNESS: John Herbert.

23 So we weren't certain as to what was going on with  
24 these actual --

25 THE COURT: So you weren't certain and therefore you

L9LsKLE5

Cross - W. Eber

1 scrubbed them off the books of the company?

2 THE WITNESS: I thought they had been retired is  
3 what -- I thought they had been retired.

4 MR. BROOK: No further questions, your Honor.

5 THE COURT: All right. We'll take a short break, and  
6 then I hope we're going to wrap this up quickly.

7 (Recess)

8 MR. BROOK: One last thing, your Honor. I wanted to  
9 do this before sitting down officially.

10 I would like to offer Exhibits 270 and 271 into  
11 evidence. Those were the ones we were looking at involving the  
12 missing document, but I'm offering those only conditioned on  
13 the court accepting the underlying document in evidence. We  
14 made an authenticity objection to that.

15 THE COURT: Remind me what the underlying...

16 MR. BROOK: I can't recall the exhibit. It was  
17 compiled with a bunch of other documents.

18 Do you know what the defense exhibit is?

19 THE COURT: You'll file something making this clear --

20 MR. BROOK: Yes.

21 THE COURT: -- and subject to that filing, they are  
22 received.

23 (Plaintiff's Exhibits 270 and 271 received in  
24 evidence)

25 All right. Redirect.

L9LsKLE5

Redirect - W. Eber

1 REDIRECT EXAMINATION

2 BY MR. SANTORO:

3 Q. How are you doing, Wendy?

4 A. I'm good.

5 Q. All right. On the issue of the shares that we were just  
6 talking about towards the end of your direct testimony, do you  
7 recall that Canandaigua National Bank filed an accounting,  
8 right?

9 A. Yes.

10 MR. SANTORO: Samantha, can we pull up Defendants'  
11 Exhibit OOOO. If we can go to schedule A of that account.

12 THE COURT: You're going to tell me it's not listed  
13 there, right?

14 MR. SANTORO: I'm sorry, Judge?

15 THE COURT: You're going to tell me it's not listed  
16 there, the stock?

17 MR. SANTORO: It's not listed there or in the order  
18 approving the account, which is Exhibit TTTT.

19 THE COURT: Fine. Next proposition.

20 MR. SANTORO: Very good.

21 BY MR. SANTORO:

22 Q. Wendy, there was a lot of discussion about your  
23 communications with Bob Lowenthal and Canandaigua National  
24 Bank, right?

25 A. Yes.



L9LsKLE5

Redirect - W. Eber

1 Q. Now, the line of credit -- well, withdrawn.

2 The loan that Eber-Connecticut had with Canandaigua  
3 National Bank before 2012, was there a guarantor on that loan?

4 A. Yes.

5 Q. Who was the guarantor?

6 A. My father.

7 Q. Prior to the foreclosure in 2012, did anyone put up any  
8 collateral in connection with that loan?

9 A. Yes.

10 Q. Who did so?

11 A. My father.

12 Q. What did he put up in the way of collateral?

13 A. First, he put up a CD for \$500,000, and then when the  
14 company did worse, he put up more collateral, I think, between  
15 120 and \$150,000.

16 Q. This was all before the foreclosure in 2012, right?

17 A. Yeah, I believe so.

18 Q. OK. Now, when did Eber Wine & Liquor secure its credit  
19 facility with Wells Fargo?

20 A. I think it was 2006.

21 Q. OK. What month?

22 A. Was it March, something like that? March.

23 Q. And when were the -- what were the dates of the promissory  
24 notes we were looking at earlier?

25 A. I think March.

L9LsKLE5

Redirect - W. Eber

1 Q. Were those promissory notes signed at the same time as the  
2 credit facility with Wells Fargo?

3 MR. BROOK: Objection.

4 THE COURT: What's the objection?

5 MR. BROOK: Lack of personal knowledge as to when they  
6 were actually signed. We can say when they were dated, but...

7 THE COURT: Sustained.

8 A. I think it was with the same time.

9 THE COURT: Answer is stricken.

10 MR. SANTORO: There is a sustained objection.

11 THE WITNESS: Oh, sorry.

12 BY MR. SANTORO:

13 Q. Now, there was some questions about IRA contributions and  
14 matching IRA contributions for Lester's IRA, right, the 401(k),  
15 was it?

16 A. Yes.

17 Q. OK. And what happened to Lester's retirement accounts?

18 A. They -- he drained almost all of his retirement accounts to  
19 make loans to the company. He gave up his pension plan  
20 entirely, and then he paid various liabilities of the company  
21 with his 401(k) and his IRA --

22 MR. BROOK: Objection, nonresponsive.

23 THE COURT: Stricken.

24 Let's start again, if you want to get into this and  
25 establish personal knowledge.

L9LsKLE5

Redirect - W. Eber

1 THE WITNESS: I do have personal knowledge.

2 THE COURT: I want to hear it.

3 Q. Wendy, you're the executor of your father's estate,  
4 correct?

5 A. I am.

6 Q. And in the course of discharging your obligations as  
7 executor, have you been through your father's records?

8 A. I have.

9 Q. As part of going through your father's records, have you  
10 reviewed his various retirement accounts?

11 A. I --

12 Q. And can you tell me what happened to those retirement  
13 accounts?

14 A. Yes.

15 THE COURT: Sustained.

16 Look, you can't do it this way, counselor. You know  
17 it. If there are records that show various things, the records  
18 are the best evidence. I will not find persuasive attempts to  
19 put the rosier face on whatever the witness thinks she may  
20 recall.

21 THE WITNESS: Your Honor --

22 MR. SANTORO: Don't answer.

23 Q. So you were asked about Eber-Metro's \$14 million in  
24 goodwill, right?

25 A. Yes.

L9LsKLE5

Redirect - W. Eber

1 Q. You authorized it to be written off the books?

2 A. Yes.

3 Q. And can you tell me at that time what the actual value of  
4 that goodwill was?

5 A. Zero.

6 Q. OK. What leads you to that belief?

7 A. The companies were insolvent. There was no value there.

8 Q. Then there was some testimony about receivables that were  
9 transferred into Segway LLC, right?

10 A. Yes.

11 Q. And can you tell me why those receivables were received  
12 into Segway LLC?

13 A. Yes.

14 Q. Can you please tell me?

15 A. Yes. I paid 100 -- approximately 150 or 160,000 towards  
16 the Teamsters withdrawal liability, and because of that, Eber  
17 Brothers assigned me these receivables.

18 Q. This payment that you made, what was the source of that  
19 \$160,000 that you paid?

20 A. Personal funds.

21 Q. Now, finally there was some discussions about the right of  
22 first refusal that you received when Eber-Metro sold six  
23 percent of its interest in Connecticut to Polebridge Bowman.

24 Can you give me a complete answer as to your  
25 understanding of why you received that right of first refusal?

L9LsKLE5

Redirect - W. Eber

1 A. Yes, because originally it was supposed to be -- it was  
2 originally supposed to be six percent that was supposed to be  
3 sold to me. It was unable to be sold to me based on Lester  
4 having discussions with his attorney and, therefore, it went to  
5 Glenn as compensation. And, therefore, I was able to get the  
6 right of first refusal.

7 THE COURT: You testified about this earlier. You've  
8 said the first reason it went to Glenn was to get it out of the  
9 consolidated group.

10 THE WITNESS: Yes.

11 THE COURT: Then you added something about  
12 compensating Glenn, and this time you didn't mention getting it  
13 out of the consolidated group.

14 THE WITNESS: Yes. Yes, it was. Getting it out of  
15 the consolidated group was part of it as well, yes.

16 BY MR. SANTORO:

17 Q. How, to your understanding, did it get it out of the  
18 consolidated group?

19 A. Because if the company was out of the control group, it  
20 needed to be under 80 percent. And this was part of that, to  
21 get it under the 80 percent.

22 Q. So what was given to the PBGC in consideration of the  
23 release to the Eber entities?

24 A. We paid them \$2 million and my father gave up his entire --  
25 my father and my mother gave up their entire pension benefit,

L9LsKLE5

Redirect - W. Eber

1 which was approximately one point --

2 MR. BROOK: Objection to the amount as being an  
3 actuary. She is about to testify to an amount she says this  
4 pension give-up was worth based upon actuary opinion, which is  
5 expert testimony she is not qualified to give.

6 THE COURT: I'll let you cross about the \$2 million.

7 MR. BROOK: The two million there is no objection to.  
8 It is what she is about to say.

9 THE COURT: Two million in cash?

10 MR. BROOK: Two million in cash. And she is about to  
11 say how much his pension was worth based on actuary --

12 THE WITNESS: It is joint and several --

13 THE COURT: Are you seeking to elicit that, counsel?

14 MR. SANTORO: Yes, your Honor. Yes.

15 THE COURT: Well, not from this witness.

16 BY MR. SANTORO:

17 Q. OK. Without telling me the amount, can you tell me what,  
18 in addition to the cash amount of two million, was given to the  
19 PBGC in consideration of a release of its claims to the Eber  
20 entities?

21 A. It was the joint and several benefit of my father and my  
22 mother from 60 years of working for the Eber Brothers Company,  
23 that my father worked for the company.

24 Q. And can you tell me approximately how much in the way of  
25 legal fees were spent fighting with the PBGC and negotiating

L9LsKLE5

Redirect - W. Eber

1 with them?

2 A. It's hundreds and hundreds of thousands of dollars. I  
3 think it's between, like, five and 800,000, or something to  
4 that neighborhood.

5 Q. OK.

6 THE COURT: Do you know what proportion of that was  
7 spent out of company funds?

8 THE WITNESS: It's my father.

9 THE COURT: Pardon me?

10 THE WITNESS: My father. My father's personal  
11 finances.

12 THE COURT: You're telling me that all the money spent  
13 on the PBGC litigation was paid personally by your father, is  
14 that what you're telling me?

15 THE WITNESS: Close to all of it, I would assume, yes.  
16 Yes.

17 THE COURT: Close to all of it, you would assume.

18 Do you know?

19 THE WITNESS: Yes, yes. He paid -- he paid, I would  
20 say, almost all of it. I don't know where any else of it would  
21 have come from other than him.

22 THE COURT: So when you say he paid almost of all of  
23 it, you are saying that on the basis that you don't know  
24 anything else, any other place it came from?

25 THE WITNESS: There was no other money. There was no

L9LsKLE5

Redirect - W. Eber

1 other money to fund.

2 THE COURT: Did you ever see checks?

3 THE WITNESS: Yes, yes.

4 THE COURT: Well, let's just say, counsel, you've only  
5 had five years to prepare for this case, and if you can't prove  
6 that in some other way, the likelihood that the court is going  
7 to credit it is not overwhelming.

8 BY MR. SANTORO:

9 Q. Wendy, as part of your declaration which contains your  
10 direct testimony, you've offered into evidence checks that  
11 reflect payments to lawyers and other professionals in  
12 connection with the PBGC liability, correct?

13 A. Yes.

14 MR. SANTORO: OK. So we will refer to the evidence  
15 therein, your Honor.

16 Q. You've added it up on a demonstrative exhibit for the court  
17 as well, right?

18 A. I have.

19 MR. SANTORO: OK. Thank you.

20 Thank you, Wendy.

21 Thank you, your Honor.

22 THE COURT: Pardon me?

23 MR. SANTORO: My redirect is finished.

24 Thank you, your Honor.

25 THE COURT: Thank you.



L9LsKLE5

Recross - W. Eber

1 MR. BROOK: Very brief recross.

2 RECROSS EXAMINATION

3 BY MR. BROOK:

4 Q. Let's go with the last thing first.

5 Could you please put you up Exhibit 160. Let's just  
6 pick page 76, in the middle of the legal fees section.

7 Do you see there are a number of different line items  
8 here showing payments to Groom Law Group on Eber Wine &  
9 Liquor's general ledger?

10 A. Yes, I do.

11 Q. Groom Law Group, they weren't representing you in anything  
12 other than the dispute with PBGC, were they?

13 A. It was PBGC pension related, yes.

14 Q. OK. And is it correct -- and it's correct that there were  
15 no electronic records for Eber Wine & Liquor payments made  
16 after May 2012, correct?

17 A. I'm sorry?

18 Q. After May 2012, the goal was to make Eber Wine & Liquor not  
19 make payments to anyone else, right?

20 It was supposed to be a dead company, isn't that  
21 right?

22 A. I'm -- I'm not certain. Lester put the money into Eber  
23 Wine & Liquor for these to be paid.

24 Q. So you're saying that this was only paid because Lester --

25 A. Yes.

L9LsKLE5

Recross - W. Eber

1 Q. -- loaned the money?

2 So he was loaning money to pay the litigation?

3 A. Yes.

4 Q. To fight the pension that the money was also loaned to  
5 fund, is that right?

6 A. Yes. He was loaning money in at this time, yes.

7 Q. All right. Now, you said something about, you know, paying  
8 \$160,000 of your own personal funds to the Teamsters, is that  
9 right?

10 A. Yes.

11 Q. Now, isn't it true that as a general matter, you have  
12 not -- the parties have agreed that we wouldn't get into  
13 discovery about your personal finances in detail until after a  
14 decision was made on punitive damages, correct?

15 A. I don't know.

16 MR. SANTORO: I object, your Honor. I'm not sure --

17 THE COURT: What are you objecting to?

18 MR. SANTORO: I'm not sure what counsel is referring  
19 to in terms of an agreement among counsel.

20 MR. BROOK: He's new in the case, your Honor.

21 During discovery, there were objections to requests  
22 for Lester and Wendy's personal net worth, which is relative to  
23 determining punitive damages under New York law. The parties  
24 agreed at the time we were expecting a jury trial to defer  
25 discovery until after there was a determination, which is

L9LsKLE5

Recross - W. Eber

1 consistent with a number of case law presence that we saw.

2 But now I would like to ask some questions, because  
3 Ms. Eber is advising that she had \$160,000 in personal funds  
4 just to pay when that was her entire salary for a year.

5 THE COURT: OK.

6 BY MR. BROOK:

7 Q. So is it fair to say, Ms. Eber, that thanks to your  
8 husband, you do not have to spend any of your income on your  
9 personal living expenses?

10 MR. SANTORO: Objection, your Honor.

11 THE COURT: Overruled.

12 A. Can you repeat the question?

13 Q. Yes.

14 Isn't it true that thanks to your husband and his  
15 wealth, you are not required to spend any of the money that you  
16 earn on your personal living expenses?

17 A. No, that's not true.

18 Q. Don't you live in a \$7 million apartment on the Upper West  
19 Side?

20 A. No, that's not true.

21 THE COURT: Let's not do this now.

22 MR. BROOK: OK.

23 Q. And is it correct, though, that you have not produced any  
24 documents to us showing that you ever personally made a  
25 \$160,000 payment to the Teamsters?

L9LsKLE5

Recross - W. Eber

1 A. I -- there was a payment to the Teamsters. So, you know,  
2 we have got to go back --

3 Q. As you sit here today, you cannot say that this is  
4 something that you have given to your lawyers or to the  
5 plaintiffs, correct?

6 A. It was done in one payment with my father and my payment  
7 together.

8 MR. BROOK: OK. Nothing further.

9 THE COURT: OK. Thank you.

10 Mr. Santoro?

11 All right. Ms. Eber, you're excused.

12 (Witness excused)

13 Tell me what more there is on the defense case,  
14 Mr. Mulry.

15 MR. MULRY: Your Honor, tomorrow the first witness is  
16 Michael Gallagher, who is an actuary for the company. You have  
17 heard some testimony about him today. He will be appearing  
18 remotely, via Microsoft teams, so he would be the first  
19 witness. We have spoken with Mr. Mohan to do a trial run at  
20 9:15 to make sure that technologically everything is set. We  
21 expect him to be a very short witness.

22 And following him would be Frank Torchio, who is the  
23 defendants' expert. Just depending on what the cross is for  
24 that, I wouldn't know that Mr. Brook can answer that, that  
25 would say how much of the day we would need.

L9LsKLE5

Recross - W. Eber

1 THE COURT: That's it?

2 MR. MULRY: Yes. That's correct.

3 THE COURT: OK. So let me give you a heads up in a  
4 couple of ways.

5 Depending on how much time is available tomorrow, I  
6 would hear closing argument of somewhere not less than 20, no  
7 more than 30 minutes on either side. I say not less than. If  
8 I run out of time, I run out of time. It could be less than,  
9 but I'm thinking 20 to 30.

10 Secondly, because of the volume of paper, I will give  
11 you time to submit post-trial briefs. But I'm going to ask you  
12 to do it on a short timeframe, because my general practice in  
13 nonjury cases is to try to decide them right at the end of the  
14 testimony, while everything is fresh in my mind. And every day  
15 that goes by makes it harder to bring to mind as much detail as  
16 I can immediately after. So I'll try to make it relatively  
17 short.

18 Now, the third point I want to make is that, as I  
19 remember making clear to whoever the first lawyers in this case  
20 were all those years ago, and as I related to you on the first  
21 day last week, I put the idea that this litigation would go  
22 forward in this family context was something approaching insane  
23 and highly destructive and that it should have been settled.  
24 And having now heard three full days of testimony and all the  
25 testimony of principals who are left to give testimony and have

L9LsKLE5

Recross - W. Eber

1 anything to say, all I can tell you is that I understated my  
2 view at the beginning. This case cries out to be resolved, and  
3 it can't be resolved if everybody thinks that when the Lord  
4 came down from Mount Ararat, they won. It is just wrong. It's  
5 got to be someplace in between. And I think there is plenty of  
6 reason for each side to understand that if the case goes to a  
7 decision, it might be very much worse for their side than they  
8 imagine now. And that goes for both of you.

9 I just can't imagine that there are not enough assets  
10 and there isn't enough money around to make everybody not  
11 whole, not happy, but less unhappy than they are or may well  
12 wind up being. And I suggest to you that in whatever the time  
13 interval is between a quarter to four this afternoon and when  
14 you file your post-trial submissions, you spend most of your  
15 time trying to get this resolved.

16 And if it would be useful for me to try to find a  
17 magistrate judge who could help you either now or at some point  
18 along the road, I will try. As I'm sure you are assuming, the  
19 pandemic has put a severe strain on the resources here. The  
20 magistrate judges are very busy with the criminal docket, but  
21 if I can get one, I will, because I think it is important that  
22 if this is going to be resolved, it be resolved.

23 The last thing I'll say is, I was really surprised by  
24 a lot of things I heard today and saw here. OK. I will see  
25 you all in the morning.

L9LsKLE5

Recross - W. Eber

1 MR. MULRY: Your Honor, on that last point, I don't  
2 know if you want a response.

3 We consent to going to a magistrate for settlement.  
4 We have proposed that as well as private mediation. If your  
5 Honor is willing to do that and plaintiff are willing to do  
6 that, we do consent with that.

7 MR. BROOK: We'll try anything. We did meet and, your  
8 Honor, I believe, just to correct one thing, your Honor said on  
9 the first day, we actually -- your Honor, I believe, had some  
10 sort of, like, a dog injury or something.

11 We were going to mediate in front of your Honor. We  
12 ended up going in front of Judge Parker. So we did try  
13 mediation with her once, maybe twice even. And I have  
14 submitted some suggestions that have not been responded to.

15 THE COURT: The dog incident was two years after this  
16 case started. One year.

17 MR. BROOK: It was in 2017, if I recall correctly.

18 THE COURT: April 30 at 10:30 in the morning. Not  
19 ever to be forgotten.

20 MR. BROOK: That sounds awful. Incidentally the date  
21 of the PBGC court. Anyway --

22 THE COURT: All I can tell you is stay away from  
23 pit bulls.

24 MR. BROOK: We are certainly open to it. We will give  
25 it a try. I just would hesitate because I'm only one person, I

L9LsKLE5

Recross - W. Eber

1 can't be in two different places at once.

2 I would --

3 THE COURT: Look, I understand that.

4 MR. BROOK: If we are anywhere within a range of,  
5 like, 90 percent -- like right now it's at more than ten to one  
6 difference. So the only hesitation I have is just if I spend  
7 two full days trying to work on a settlement, I won't be able  
8 to do as good a job on the briefing that is required for your  
9 Honor.

10 I am certainly open to it. I would love to give it a  
11 try. I do agree, this case is best resolved settled rather  
12 than having to deal with an adverse process of trying to pull  
13 apart a company. That's not something that me or my clients  
14 are looking forward to at all. We planned for it, of course.  
15 But there is no way that that goes smoothly and isn't expensive  
16 with more lawyers than just me for possibly years to come.

17 THE COURT: Believe me, I understand that. I do  
18 understand that. Both I and people in my firm when I was in  
19 practice had cases that were some resemblance to this, and  
20 every single one was a disaster in all ways except for the  
21 firm's income statement. So I know what's involved and it's  
22 not good. And at the end of the day, people need to live with  
23 each other too. Family is family.

24 (Adjourned to Wednesday, September 22, 2021, at  
25 9:30 a.m.)



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